No. 93-70-CSX
Status: GRANTED

Title: Oregon Waste Systems, Inc., et al., Petitioners
v.
Department of Environmental Quality of the State of Oregon, et al.

Docketed:
July 14, 1993

Court: Supreme Court of Oregon

Vide:
93-108

Counsel for petitioner: Pincus,Andrew J.

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NOTE: Op. filed 041593-071493 consulted Frank re corr dt to use

Entry	Date	Note	Proceedings and Orders
1	Jul 14 1993	G	Petition for writ of certiorari filed.
3	Aug 13 1993		Brief amicus curiae of American Trucking Associations, Inc. filed.
4	Aug 13 1993		Brief amicus curiae of National Solid Wastes Management Association filed.
5	Aug 13 1993		Brief amicus curiae of Indiana filed.
6	Aug 13 1993		Brief of respondents Department of Environmental Quality, et al. in opposition filed. VIDED.
2	Aug 18 1993		DISTRIBUTED. September 27, 1993
7	Aug 23 1993	X	Reply brief of petitioners Oregon Waste Sysstems, et al. filed.
8	Sep 28 1993		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply.
			**********
9	Oct 27 1993		Record filed.
		*	Original proceedings Supreme Court of Oregon and Court of Appeals (1 BOX)
10	Nov 3 1993	G	Motion of petitioners to dispense with printing the joint appendix filed.
11	Nov 8 1993		Motion of petitioners to dispense with printing the joint appendix GRANTED.
12	Nov 8 1993		Brief of petitioner Columbia Resource Company, L.P. filed. VIDED.
13	Nov 9 1993		Brief of petitioners Oregon Waste Systems, Inc., et al. filed. VIDED.
15	Nov 18 1993		CIRCULATED.
14	Nov 22 1993		SET FOR ARGUMENT TUESDAY, JANUARY 18, 1994. (1ST CASE).
17	Dec 6 1993		Brief amici curiae of Indiana, et al. filed. VIDED.
16	Dec 7 1993		Brief of respondents Dept.of Environmental Quality of the State of Oregon, et al. filed. VIDED.
18	Dec 21 1993	X	Reply brief of petitioner Columbia Resource Company, L.P.

No. 93-70-CSX

Entry	Date	Note	Proceedings and Orders
			filed. VIDED.
19	Dec 21 1993	X	Reply brief of petitioners Oregon Waste Systems, et al. filed. VIDED.
20	Jan 18 1994		ARGUED.

93-706

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND GILLIAM COUNTY, OREGON,
PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,
RESPONDENTS

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the fact that a state fee is calculated by reference to the costs assertedly incurred by the State in regulating the taxpayer is sufficient—standing alone—to immunize the fee against Commerce Clause scrutiny, even when, as in this case, the fee taxes only interstate commerce and fails the test for discriminatory state exactions set forth in *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992).

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties listed in the caption, Columbia Resource Co., L.P., was a petitioner in the Supreme Court of the State of Oregon and is a respondent in this Court.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Oregon Waste Systems, Inc., states that its parent corporation is Waste Management, Inc., and that Waste Management, Inc.'s parent corporation is WMX Technologies, Inc. Oregon Waste Systems has no subsidiaries.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON,
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v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON,
RESPONDENTS

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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PETITION FOR A WRIT OF CERTIORARI

Oregon Waste Systems, Inc., and Gilliam County, Oregon, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Oregon in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon (App., *infra*, 1a-19a) is reported at 316 Or. 99 and 849 P.2d 500. The opinion of the Oregon Court of Appeals (App., *infra*, 20a-44a) is reported at 114 Or. App. 369 and 837 P.2d 965.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon (App., *infra*, 45a-46a) was entered on June 9, 1993. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 459.297 and 459.298 of the Oregon Revised Statutes (1991) and the pertinent parts of Oregon Administrative Rules 340-97-110 and 340-97-120 (formerly 340-61-115 and 340-61-120, respectively) are reprinted at pages 47a-49a of the appendix to this petition.

STATEMENT

In *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992), this Court held invalid under the Commerce Clause an Alabama statute that taxed the disposal of waste generated outside the State but did not tax the disposal of Alabama-generated waste. The law at issue here is indistinguishable from the discriminatory measure declared unconstitutional in that case. Oregon has levied a tax that discriminates expressly—and solely—on the basis of state of origin: disposal of interstate waste is taxed while disposal of Oregon-generated waste is not.

Amazingly, the Oregon Supreme Court held the Oregon tax lawful under the Commerce Clause. The state court concluded that the measure did not have to satisfy the Commerce Clause standard generally applicable to discriminatory taxes and regulations because the tax is calculated by reference to the costs to the State from disposal of the waste. That ruling

squarely conflicts with a recent decision by the United States Court of Appeals for the Seventh Circuit holding unconstitutional a virtually identical tax provision. This Court should grant the petition for a writ of certiorari in order to resolve the conflict and correct the erroneous interpretation of the Commerce Clause adopted by the court below.

A. Background

Disposal of solid waste—a category of waste that generally includes all refuse that is not hazardous[1]—is regulated both by the federal government and by the States. Federal law fixes certain minimum standards for disposal facilities (see, *e.g.*, 42 U.S.C. §§ 6944 & 6945) and requires the preparation of state waste management plans (*id.* §§ 6942, 6943 & 6947), but leaves to the States the supervision of solid waste disposal.

---

[1] Under Oregon law,

> "[s]olid waste" means all putrescible and nonputrescible wastes, including but not limited to garbage, rubbish, refuse, ashes, waste paper and cardboard; sewage sludge, septic tank and cesspool pumpings or other sludge; commercial, industrial, demolition and construction wastes; discarded or abandoned vehicles or parts thereof; discarded home and industrial appliances; manure, vegetable or animal solid and semisolid wastes, dead animals, infectious waste * * * and other wastes; but the term does not include:
>
> (a) Hazardous wastes as defined in ORS 466.005.
>
> (b) Materials used for fertilizer or for other productive purposes or which are salvageable as such materials are used on land in agricultural operations and the growing or harvesting of crops and the raising of animals.

Or. Rev. Stat. § 459.005(27) (1991). See also 42 U.S.C. § 6903(27) (substantially similar definition).

Oregon comprehensively regulates the disposal of solid waste within the State. For example, a state permit is required in order to operate a solid waste disposal site (Or. Rev. Stat. § 459.205 (1991)); the site must be operated in accordance with the governing laws and regulations and the terms specified in the permit (*ibid.*; *id.* § 459.376); the types of materials that may be disposed of at such a facility are limited by state law (*id.* § 459.247); and when disposal operations are concluded at a site, the owner must close the site and maintain it in accordance with specified standards (*id.* §§ 459.268 & 459.270). These statutory provisions are supplemented by a large body of regulations. See Or. Admin. R. Chapter 340, Divisions 93-97.

Oregon levies a number of different fees in connection with its regulation of solid waste disposal. These include:

—a permit application fee that "shall be based on the anticipated cost of filing and investigating the application, of issuing or denying the requested permit and of an inspection program to determine compliance or noncompliance with the permit" (Or. Rev. Stat. § 459.235(2) (1991)), which ranges from $100 to $10,000 for solid waste disposal (Or. Admin. R. 340-97-120(2));

—an annual fee, for the purpose of implementing the permit compliance program and other statutory requirements, to be "based on the amount of solid waste received at the disposal site in the previous calendar year" (Or. Rev. Stat. § 459.235(3) (1991)), which is fixed at $.21 per ton for landfills (Or. Admin. R. 340-97-120(3));

—an annual fee for the purpose of financing recycling programs, set at $.09 per ton (Or. Admin. R. 340-97-120(4)); and

—an annual fee, to be used for removal or remediation of hazardous substances at certain solid waste disposal sites, "based on the estimated tonnage or the actual tonnage, if known, received at the site and any other similar or related factors the [Environmental Quality Commission] finds appropriate" (Or. Rev. Stat. § 459.236 (1991)), which is set at $.13 per ton (Or. Admin. R. 340-97-120(5)(d)).

The county in which a disposal site is located also may impose a fee, the proceeds of which may be used for a variety of purposes, including mitigation of any adverse effects on the environment. The amount of the fee may be agreed upon between the county and the site operator; in the absence of an agreement, the statute provides for a formula based upon the number of tons of waste disposed of at the site. Or. Rev. Stat. § 459.310 (1991).

This case involves an additional fee on waste disposal levied by the Oregon Legislature in 1989. That provision, which is entitled "[s]urcharge on solid waste generated out-of-state," is expressly limited to "person[s] who dispose[] of solid waste generated out-of-state." Or. Rev. Stat. § 459.297 (1991). A companion provision directs the Environmental Quality Commission to fix the amount of the fee by regulation on the basis of "the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state" other than costs recovered under various other Oregon laws. *Id.* § 459.298.[2] This fee is "in addition to any other fee

[2] The costs "may include but need not be limited to costs incurred for:

(1) Solid waste management;

charged for disposal of solid waste at the site." *Id.* § 459.297. No Oregon statute requires that an equivalent fee be levied on waste generated within the State.

Following the enactment of the statute, the Environmental Quality Commission instituted an administrative proceeding to fix the amount of the fee on disposal of out-of-state waste. It established $2.25 per ton as the additional fee for waste generated out-of-state. Or. Admin. R. 340-97-120(7) (formerly 340-61-120(6)).[3]

At the same time that it enacted the additional fee on disposal of out-of-state waste, the Oregon Legislature levied an additional fee on disposal of solid waste generated within the State to raise revenues to support environmental protection programs, solid waste planning, and recycling. See 1989 Or. Laws 833, §§ 152 & 153. The fee on Oregon waste, however, was capped at $.50 per ton (later increased to $.85 per ton). Or. Rev. Stat. §§ 459A.110(5) & 459A.-115 (1991). The latter amount is 36% of the additional $2.25 per ton imposed on disposal of non-Oregon waste.[4]

(2) Issuing new and renewal permits for solid waste disposal sites;

(3) Environmental monitoring;

(4) Ground water monitoring; and

(5) Site closure and post-closure activities."

Or. Rev. Stat. § 459.298 (1991).

[3] The Commission initially adopted a fee of $2.75 per ton, but that regulation was disapproved by the state Emergency Board. See Or. Rev. Stat. § 459.298 (1991) (requiring Emergency Board approval during the interim between sessions of the rule promulgated by the Commission).

B. The Decisions Below

Petitioner Oregon Waste Systems, Inc. ("OWS"), owns and operates a solid waste landfill southwest of the City of Arlington in Gilliam County, Oregon. Both solid waste generated within Oregon and solid waste generated outside the State are disposed of at this landfill. Petitioner Gilliam County receives direct and indirect benefits from the operation of the landfill, both in terms of employment of county residents and the payment to the county of local fees and taxes.

Following the Environmental Quality Commission's issuance of the rule fixing the disposal fee at $2.25 per ton, petitioners sought judicial review of the rule in the Oregon Court of Appeals. See Or. Rev. Stat. § 183.400 (1991) (providing for judicial review of administrative rules). Petitioners challenged the rule under state law and also on the ground that the rule violated the Commerce Clause of the United States Constitution.

[4] Apparently concerned that the invalidation by the courts of the $2.25 per ton fee would create a situation in which only Oregon waste was subject to an additional levy, the Oregon Legislature in 1991 amended the statute to subject out-of-state waste to the same $.85 per ton charge as Oregon waste. See Or. Rev. Stat. § 459A.110(6) (1991) (as amended by 1991 Or. Laws 385, § 13a). (This fee was added to the $2.25 fee, which was left in place by the Legislature.) If the $2.25 per ton fee ultimately is upheld by the courts, however, the $.85 per ton fee would again be limited to Oregon waste. 1991 Or. Laws 385, §§ 91 & 92. Thus, the ultimate result would be the same as under the original 1989 law—the surcharge for Oregon waste would be $.85 per ton, while the surcharge for out-of-state waste would be $2.25 per ton.

The state court of appeals rejected the constitutional challenge. App., *infra*, 43a-44a. The court characterized the Oregon exaction as a "compensatory fee" (*id.* at 39a) because it is "based on and applied to the provision of a narrow range of state services that are directly connected to the activity on which the fees are imposed." *Id.* at 41a n.19. Cautioning that cases addressing Commerce Clause challenges to "discriminatory health and general welfare laws and general revenue measures" did not provide the controlling standard (*id.* at 40a n.19), the court stated that such a fee is invalid under the Commerce Clause only if it "is excessive for the purpose for which it is collected" or if " 'there is no sufficient relation between the measure employed and the extent or manner of use' of the state provided service." *Id.* at 40a (citation omitted). The court concluded that petitioners had failed to establish that the fee on disposal of out-of-state waste was either excessive or unrelated to the state provided services. *Id.* at 44a.[5]

The state supreme court affirmed. App., *infra*, 1a-19a. It stated that "[b]ecause of the express nexus to actual costs incurred, * * * [the fee on out-of-state waste] does not, on its face, constitute discrimination against an article of commerce, the origin

[5] The court observed that the statute governing the judicial review proceeding provided that the reviewing court could examine only the rule under review, the statutory provisions authorizing the rule, and certain rulemaking documents. App., *infra*, 44a (quoting Or. Rev. Stat. § 183.400(3)). The court stated that "[a] facial review of the enabling legislation and the rules does not show that the fees are either excessive or unrelated to the state provided service." *Id.* at 44a.

of which is outside the state." *Id.* at 17a. The court further stated that the fee "constitutes a 'compensatory' fee for specific costs incurred by the state in the regulation of [out-of-state] waste. A law imposing a compensatory fee for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce is *prima facie* reasonable." *Id.* at 18a (citations omitted). The sole inquiry under the Commerce Clause, the court said, is whether the amount of the fee is " 'manifestly disproportionate to the services rendered.' " *Ibid.* (quoting *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)).

REASONS FOR GRANTING THE PETITION

The Oregon Supreme Court's decision upholding the facially discriminatory tax on waste generated outside Oregon rests on an interpretation of the Commerce Clause that has been rejected repeatedly by this Court—the view that state user fees may be upheld even if they discriminate against interstate commerce. Moreover, the decision below squarely conflicts with a recent decision of the United States Court of Appeals for the Seventh Circuit, which held invalid under the Commerce Clause a virtually identical Indiana tax statute precisely because the statute discriminated on its face against interstate commerce.

The Oregon court's decision, if not corrected by this Court, threatens to create confusion not simply in the important area of taxes on interstate commerce in waste, but more generally with respect to the proper standards for evaluating the constitutionality of the numerous state exactions that are

denominated as user fees. The petition for a writ of certiorari should be granted.[6]

A. The Oregon Supreme Court's Decision Squarely Conflicts With A Recent Seventh Circuit Decision Invalidating A Virtually Identical Statute.

The Oregon court's decision is starkly inconsistent with another lower court decision in which a virtually identical statute was invalidated on Commerce Clause grounds. Review is warranted to resolve this conflict among the lower courts.

The Indiana statute at issue in *Government Suppliers Consolidating Services, Inc.* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 113 S. Ct. 977 (1993), directed the state solid waste management board to adopt a rule imposing a fee on the disposal within Indiana of solid waste "generated outside Indiana" in an amount "necessary to offset the costs incurred by the state or a county, municipality, or township that can be attributed to the importation of the solid waste into Indiana and the presence of

[6] The question presented in this case is not related to the Commerce Clause issue presented in *Northwest Airlines, Inc.* v. *Kent County*, No. 92-97, cert. granted, 61 U.S.L.W. 3818 (U.S. June 7, 1993). The focus of that case is whether Congress has by statute eliminated the Commerce Clause limits on state authority to impose airport rents and fees. The particular Commerce Clause claim in *Northwest Airlines* involves whether a state scheme—neutral on its face—discriminates against interstate commerce. In the present case, by contrast, there is no claim of congressional authorization. And there is no dispute about the existence of discrimination: the Oregon law at issue here expressly singles out interstate commerce for discriminatory treatment. Accordingly, there is no reason for the Court to hold the certiorari petition in this case pending its decision in *Northwest Airlines*.

the solid waste in Indiana." Ind. Code § 13-9.5-5-1(b), *reprinted in* 975 F.2d at 1271-1272 n.4. The close resemblance to the Oregon statute challenged here is striking: both laws mandated a fee on disposal of interstate waste to be based on the costs of that disposal to the States, and neither statute imposed a parallel requirement on intrastate waste.

The Seventh Circuit held the Indiana statute unconstitutional on its face. 975 F.2d at 1283-1284. The State contended that the statute was justified because it " 'requires out-of-state haulers to shoulder their fair share of in-state administrative costs.' " *Id.* at 1283 (citation omitted). The Seventh Circuit stated that "[t]he problem with Indiana's argument is that it would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds. We find no support in the caselaw for such a result." *Id.* at 1284. Relying on this Court's decisions prohibiting taxes that discriminate against interstate commerce (*ibid.*), the Seventh Circuit held the statute unconstitutional under the Commerce Clause.

Thus, essentially the same statute has been upheld against Commerce Clause challenge by a state supreme court and struck down under the Commerce Clause by a federal court of appeals because the two courts applied different legal standards in evaluating the measure's constitutionality. Oregon's courts have permitted the State to impose the very tax that a federal court has barred the State of Indiana from levying. Businesses that send waste into Indiana are free from a burden that Oregon has been permitted to impose upon those who transport waste into that

State. This Court should grant review to eliminate these disparities.

B. This Court's Decisions Establish Beyond Any Doubt That User Fees That Discriminate Against Interstate Commerce Violate The Commerce Clause.

The Oregon Supreme Court's decision is at war with this Court's Commerce Clause jurisprudence. Its reasoning would allow a State to impose highway tolls on out-of-state vehicles while exempting in-state vehicles, inspection fees on out-of-state produce while exempting in-state produce, and license charges on out-of-state businesses while exempting in-state businesses. That decision should not be permitted to stand.

1. This Court repeatedly has affirmed that "'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.' Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2014 (1992) (citation omitted). This principle has been applied most often to state regulations and state taxes designed to raise revenues for general purposes. But this Court's decisions leave no doubt that the same rule applies to all types of state financial exactions, including user fees charged by the State for the use of state-provided facilities or services.[7]

[7] The Court has described "user fees" or "user taxes" as those exactions "designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 621 (1981).

In *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Court considered a Commerce Clause challenge to a $1 per person "use and service charge" for passengers enplaning from the Evansville airport; the fee was designed to recover the costs to the Authority of constructing and maintaining the airport (405 U.S. at 709). The Court held that "so long as the [user fee] is based on some fair approximation of use or privilege for use [of governmental resources] * * * and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster." *Id.* at 716-717.

The Court in that case first inquired whether the fee "discriminate[d] against interstate commerce and travel." *Id.* at 717. Observing that "both interstate and intrastate flights are subject to the same charges," and that there was "no showing of any inherent difference between these two classes of flights, such that the application of the same fee to both would amount to discrimination against one or the other," the Court held the fee nondiscriminatory. *Ibid.*[8]

More recently, in *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), the Court reaffirmed that user fees are valid under the Commerce Clause only if they are *both* nondiscriminatory *and* represent a fair approximation of the use of the govern-

[8] The Court then went on to apply the other parts of the test, examining whether the charge "reflect[s] a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed" (405 U.S. at 717) and whether the charge was "excessive in relation to costs incurred by the taxing authorities" (*id.* at 719).

ment facilities or services. 483 U.S. at 289-290. Pennsylvania argued in that case that the marker fee and axle tax there at issue could be upheld as constitutionally-permissible user fees. The Court squarely rejected that argument on the ground that the fees "discriminate[d] against out-of-state vehicles." *Id.* at 290. Cf. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 261-262 (1974) (government may not require nonresident indigent individuals to bear costs of hospitalization while providing free services to residents); *Toomer* v. *Witsell*, 334 U.S. 385, 402-403 (1948) (Privileges and Immunities Clause prohibits State from charging discriminatory license fee to nonresidents).

Under this Court's cases, therefore, the threshold inquiry in evaluating the constitutionality of the Oregon fee is whether the exaction discriminates against interstate commerce. Because the fee "discriminates both on its face and in practical effect [against interstate commerce], the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Chemical Waste Management*, 112 S. Ct. at 2014 (quoting *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)).

The Oregon Supreme Court did not undertake that inquiry. Observing that a user fee's "express nexus to actual costs incurred" provides a "discernible basis" for the fee separate from the out-of-state origin of the waste (App., *infra*, 17a), the court concluded that a State is free to "impos[e] a compensatory fee for costs incurred * * * in supervising and

regulating the activities of an entity engaged in interstate commerce" while exempting entities engaged in intrastate commerce from paying the cost of precisely the same supervisory and regulatory activities. *Id.* at 18a. In the Oregon court's view, all that need be considered to assess the validity of a user fee under the Commerce Clause is whether the amount of the fee is "'manifestly disproportionate to the services rendered.'" *Ibid.* (quoting *Clark* v. *Paul Gray, Inc.*, 306 U.S. at 599).

But the fact that a user fee may serve a legitimate public purpose—cost recovery—falls far short of establishing that discriminatory user fees will always satisfy the stringent Commerce Clause standard prescribed by this Court in *Chemical Waste Management*. See 112 S. Ct. at 2013 (listing cases in which "'a presumably legitimate goal was sought to be achieved by the illegitimate means'" of imposing a discriminatory burden on interstate commerce). The State not only must demonstrate a legitimate purpose but also must establish that the purpose could not be achieved by a less discriminatory means. In virtually every case there will be other, nondiscriminatory means by which the State may recover its costs, such as an across-the-board fee on both intrastate and interstate commerce.

What Oregon has done is to reduce the two-part user fee standard applied by this Court in *Evansville-Vanderburgh Airport* and *Scheiner* to a one-part test. A fee that is based on the costs incurred by the State will always pass muster under the Commerce Clause regardless of the extent of the discriminatory burden imposed upon interstate commerce or the availability to the State of nondiscriminatory alternatives.

There simply is no support in this Court's decisions for the startling proposition that undergirds the decision below—that once a court determines that the state levy at issue is a user fee, the anti-discrimination element of the Commerce Clause is no longer in issue. As we have discussed, far from holding that a user fee should not be scrutinized to determine whether it discriminates against interstate commerce, this Court's decisions expressly recognize that such fees must be examined on an individual basis to determine whether they comport with the anti-discrimination obligation imposed by the Commerce Clause. The Oregon court's approach would eliminate that inquiry in every user fee case.[9]

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[9] Indeed, none of the cases relied upon by the Oregon Supreme Court hold that a user fee may pass muster under the Commerce Clause even if it discriminates against interstate commerce. The statute at issue in *Clark* v. *Paul Gray, Inc.*, *supra*, required individuals to obtain a license, and pay a license fee, in order to transport motor vehicles for the purpose of offering them for sale. The statute exempted some, but not all, intrastate transportation from the license requirement. The Court considered and rejected the claim that the statute discriminated against interstate commerce, holding that the taxpayer lacked standing to challenge one of the exemptions (306 U.S. at 596) and that the other exemption involved transportation that differed in character—and therefore in the burden imposed on state resources—from the transportation that was subject to the fee (*id.* at 596-598). By evaluating the claim of unjustified discrimination on the merits, and rejecting it only because the statutory classification was justified by a factor other than the in-state destination of the exempt traffic, *Clark* makes clear that user fees may be upheld only if they are *non*discriminatory.

In *Great Northern Ry.* v. *Washington*, 300 U.S. 154 (1937), there was no claim of discrimination. The statute in question levied an identical fee on all public utilities, those engaged in intrastate commerce and those engaged in interstate commerce; the Court held that the State failed to carry its burden of showing that the fees did not exceed what was reasonably necessary to cover the cost of its regulatory and supervisory activities (300 U.S. at 168). See also *Ingels* v. *Morf*, 300 U.S. 290 (1937) (fee struck down on ground it lacked reasonable relation to costs of regulation; Court did not reach discrimination claim). Finally, *Commonwealth Edison Co.* v. *Montana*, *supra*, involved a general revenue tax, not a user fee, and the Court expressly "put to one side" its decisions addressing user fees. 453 U.S. at 621. Moreover, the Court upheld the tax in that case because it did *not* discriminate against interstate commerce.

Moreover, the Oregon court did not explain why user fees—unlike every other form of governmental charge and regulation—should be exempt from the fundamental anti-discrimination principle embodied in the Commerce Clause. The policies underlying the Commerce Clause apply with equal force in this context. Discriminatory user fees can create the same barriers against interstate trade as other types of discriminatory measures, and can fuel the very sort of commercial rivalries among the States that the Commerce Clause was designed to prevent. Any type of state enactment that expressly discriminates against interstate commerce—be it a regulation, tax, or user fee—must satisfy the *Chemical Waste Management* standard in order to pass muster under the Commerce Clause.[10]

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[10] Indeed, rather than holding that user fees are subject to more relaxed Commerce Clause review, as the court below stated, this Court has subjected such fees to more searching review in one respect—"[b]ecause such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, [the Court] ha[s] required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered.'" *Commonwealth*

2. Had it applied the proper test, the Oregon Supreme Court would have invalidated the Oregon fee on the ground that the discriminatory exaction clearly violates the Commerce Clause's anti-discrimination principle.

The Oregon regulation, and the underlying statutory provisions, are constitutionally indistinguishable from the Alabama tax held unconstitutional by this Court in *Chemical Waste Management*. The Alabama law imposed a disposal tax only on interstate waste disposed of within the State. This Court held that Alabama bore the burden of justifying the discriminatory tax " 'both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.' " 112 S. Ct. at 2014 (citation omitted).

Alabama could not carry that burden. The Court found that Alabama failed to show that the tax on interstate waste was justified by higher costs or environmental risks associated with the disposal of that waste. Because these factors did not vary with the origin of the waste, but were the same for each ton of waste regardless of origin, the State could not single out interstate waste for a higher tax burden. 112 S. Ct. at 2014-2016. Less discriminatory alternatives were available, "not the least of which [is] a generally applicable per-ton additional fee on *all* hazardous waste disposed of within Alabama." *Id.* at 2015 (emphasis in original).

Edison, 453 U.S. at 622 n.12 (citation omitted). The burden imposed upon taxpayers by general revenue taxes is subject to much less searching judicial scrutiny. *Id.* at 625-629.

The Oregon regulation suffers from the same flaw. Interstate waste alone is targeted for an additional exaction, but—as was the case with the Alabama statute—neither the Oregon law nor the regulation links that additional burden to any unique characteristic of interstate waste, such as a higher per-ton cost to the State as compared to Oregon waste. Rather, the statute's very terms establish that the categories of costs that the State seeks to recover through the fee are the kinds of costs that result from the disposal of all types of waste. See Or. Rev. Stat. § 459.298 (1991) (referring to costs incurred for solid waste management, issuing permits for disposal sites, environmental and ground water monitoring, and site closure activities).

Thus, each ton of interstate waste is assessed a fee calculated to reimburse the State for the entire cost of regulating disposal of that waste, but intrastate waste is exempt from that burden and instead is assessed a fee representing a significantly smaller share of the State's costs. (The additional fee applicable to Oregon waste is only 36% of the amount applicable to interstate waste. See pages 6-7, *supra*.) The regulation subjects interstate commerce to a burden from which intrastate commerce is exempt: compensating the State for *all* of the costs associated with waste disposal.

As with the Alabama tax, such blatant discrimination violates the Commerce Clause. The face of the statute makes clear that the purpose of the fee is to recover the costs associated with regulating waste disposal. Yet Oregon has not pointed to any reason why it cannot recover all of its costs of regulation through a nondiscriminatory per-ton fee on all waste disposed of within the State. (Indeed, Oregon already

uses nondiscriminatory fees to recover a wide variety of costs associated with its regulation of waste disposal. See pages 4-5, *supra*.)[11] Because there plainly are less discriminatory means by which Oregon may accomplish its purpose, the fee on interstate waste violates the Commerce Clause.

C. The Question Presented Has Considerable Practical Significance.

The implications of the Oregon Supreme Court's "user fee exception" are staggering. The airport tax at issue in *Evansville* would have been constitutional even if it were levied *only* on interstate passengers. A State that required, for example, inspection of meat and produce before it could be sold could impose the full cost of inspection on out-of-state goods while levying no fee at all for performing the same inspections of in-state products.

[11] The state court of appeals speculated (App., *infra*, 43a) that the discriminatory fee might be justified on the ground that the State regulates the generators of Oregon waste but does not regulate generators of interstate waste. But Oregon law requires that all waste satisfy the same standards in order to be disposed of in Oregon landfills. See, *e.g.*, Or. Rev. Stat. § 459.305 (1991) (permitting disposal of interstate waste only if it is the product of a regulatory regime requiring out-of-state generators to engage in the equivalent degree of waste reduction and recycling as Oregon generators).

Moreover, the discriminatory fee is calculated on the basis of *all* costs incurred by the State, not simply any increased costs that might result from any differences between interstate and Oregon waste. Because costs that are not unique to interstate waste are included in the fee, but intrastate waste is not required to bear those same costs, the fee plainly discriminates against interstate waste. For these reasons, it is not surprising that the state supreme court did not rely on the lower court's speculation; indeed, the supreme court did not even mention the point.

Creating such a significant difference in the Commerce Clause standards applicable to general taxes and user fees would almost certainly trigger a dramatic increase in the number and magnitude of discriminatory user fees. This Court has long recognized that States have an inherent incentive to shift costs to out-of-state taxpayers. See, *e.g.*, *Nippert* v. *City of Richmond*, 327 U.S. 416, 434-435 (1946) (in invalidating a discriminatory tax, the Court observed that "[p]rovincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation"). Although the political process does provide a check against disproportionate *nondiscriminatory* fees, because such fees are borne by intrastate as well as interstate commerce, the political process provides little or no protection against disproportionate *discriminatory* fees because the parties burdened by such fees are not represented. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940) ("to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state"). States would rush to impose discriminatory user fees and to recharacterize as many levies as possible as fees for "costs" incurred by the State.

Indeed, States might well begin to impose user fees to recover potential costs, such as the costs associated with hazardous materials, but only with respect to interstate commerce in such materials. Alabama, for example, could reenact the $72 tax on disposal of out-of-state hazardous waste invalidated in *Chemical Waste Management* and attempt to defend the levy

as a user fee based on the State's actual and potential costs. The opportunities for economic protectionism disguised as cost recovery would be tremendous.

The truncated Commerce Clause standard formulated by the Oregon court would provide no real protection against these unjustified burdens. Courts would be able to invalidate a fee limited to interstate commerce only if the fee was manifestly disproportionate to the State's costs, a test that leaves considerable leeway for the imposition of heavy—and discriminatory—burdens on interstate commerce. This Court should grant the petition to make clear that there is no loophole for user fees in the anti-discrimination mandate of the Commerce Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 14, 1993

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APPENDICES

APPENDIX A

FILED: April 15, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

GILLIAM COUNTY, OREGON, and OREGON WASTE SYSTEMS, INC., PETITIONERS ON REVIEW

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, RESPONDENT ON REVIEW

COLUMBIA RESOURCE COMPANY, L.P., a Washington Limited Partnership, PETITIONER ON REVIEW

v.

ENVIRONMENTAL QUALITY COMMISSION, RESPONDENT ON REVIEW

(DEQ 45-1990; CA A68441 (Control), A68455)
(cases consolidated)
(SC S39659, S39658)

In Banc

On review from the Court of Appeals.*

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* Judicial review from the Department of Environmental Quality and the Environmental Quality Commission. 114 Or App 369, 837 P2d 965 (1992).

Argued and submitted March 4, 1993.

John DiLorenzo, of O'Connell, Goyak & DiLorenzo, Portland, argued the cause and filed the petition for petitioner on review Columbia Resource Company, L.P. With him on the petition was Michael E. Farnell.

J. Laurence Cable, of Cable, Huston, Benedict, Haagensen & Ferris, Portland, argued the cause for petitioner on review Oregon Waste Systems, Inc. James E. Benedict filed the petition for review. With Mr. Benedict on the petition was James M. Coleman, of O'Donnell, Ramis, Crew & Corrigan, Portland, who waived argument for petitioner on review Gilliam County, Oregon,

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondents on review. With him on the response to the petition were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

GRABER, J.

The decision of the Court of Appeals is affirmed.

GRABER, J.

At issue in this case is the validity of regulations imposing a per-ton surcharge on the disposal in Oregon of solid waste generated outside the state. ORS 459.297(1) provides:

> "Beginning on January 1, 1991, every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall pay a surcharge as established by the Environmental Quality Commission under ORS 459.298. The surcharge shall be in addition to any other fee charged for disposal of solid waste at the site."

ORS 459.298 provides:

> "Subject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297. The amount of the surcharge shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for under the provisions of [statutes relating to solid waste disposal, domestic solid waste disposal, and household hazardous waste disposal]. These costs may include but need not be limited to costs incurred for:
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> "(1) Solid waste management;
>
> "(2) Issuing new and renewal permits for solid waste disposal sites;
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> "(3) Environmental monitoring;
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> "(4) Ground water monitoring; and
>
> "(5) Site closure and post-closure activities."

As authorized by ORS 459.297 and 459.298, the Environmental Quality Commission (EQC) promulgated rules pertaining to the disposal of solid waste. OAR 340-61-115(1) provides in part:

> "Beginning July 1, 1984, each person required to have a Solid Waste Disposal Permit shall be

subject to a three-part fee consisting of a filing fee, an application processing fee and an annual compliance determination fee as listed in OAR 340-61-120. In addition, each disposal site receiving domestic solid waste shall be subject to an annual recycling program implementation fee as listed in OAR 340-61-120, and a per-ton fee on domestic solid waste * * *. In addition, each disposal site or regional disposal site receiving waste generated out-of-state shall pay a surcharge * * *."

OAR 340-61-120(6) provides:

"Surcharge on disposal of waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state waste received at the disposal site[.]"

Petitioners Oregon Waste Systems, Inc., Columbia Resource Company, L.P., and Gilliam County, Oregon,[1] sought judicial review of OAR 340-61-115(1)

[1] The Court of Appeals explained petitioners' interest in the surcharge:

"Petitioner Oregon Waste Systems, Inc. (OWS), owns and operates a regional solid waste disposal facility known as the Columbia Ridge Recycling Center and Landfill. It is located southwest of Arlington in Gilliam County. OWS disposes of waste generated in Oregon and also waste generated outside of Oregon. The operation provides direct and indirect benefits to petitioner Gilliam County as a result of employment in the county and the payment of local fees and taxes.

"Petitioner Columbia Resource Company, L.P. (CRC), has a 20-year contract with Clark County, Washington, under which it disposes of solid waste originating there. CRC uses the Finley Buttes Landfill in Morrow County as its disposal site. The operator of the Finley Buttes Landfill passes through to CRC the costs incurred for disposal, including charges made by respondent Department of Environmental Quality (DEQ)."

Gilliam County v. Dept. of Environmental Quality, 114 Or App 369, 372, 837 P2d 965 (1992).

and 340-61-120(6) in the Court of Appeals pursuant to ORS 183.400.[2] Petitioners argue that, because

[2] ORS 183.400 provides in part:

"(1) The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.

"* * * * *

"(3) Judicial review of a rule shall be limited to an examination of:

"(a) The rule under review;

"(b) The statutory provisions authorizing the rule; and

"(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.

"(4) The court shall declare the rule invalid only if it finds that the rule:

"(a) Violates constitutional provisions;

ORS 459.298 requires approval of the amount of the surcharge by the Joint Ways and Means Committee or by the Emergency Board and because those approval provisions are not severable from the remainder of the statute, ORS 459.298 violates Article I, section 21;[3] Article III, sections 1[4] and 3;[5] Article IV, section 25;[6] and Article V, section 15b,[7] of the Oregon Constitution. As a result, they argue, the implementing regulations also are invalid. In the alternative, petitioners argue that, even if ORS 459.298, OAR 340-61-115(1), and OAR 340-61-120(6) are valid under the Oregon Constitution, they are invalid because they impermissibly discriminate against interstate commerce in violation of the Commerce Clause, Article I, section 8, clause 3,[8] of the Constitution of the United States.

Respondent Department of Environmental Quality (DEQ), the state agency for which EQC is the policy making body, concedes that, "to the extent [that

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"(b) Exceeds the statutory authority of the agency; or

"(c) Was adopted without compliance with applicable rulemaking procedures."

[3] Article I, section 21, of the Oregon Constitution, provides in part:

"[N]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution[.]"

[4] Article III, section 1, of the Oregon Constitution, provides:

"The powers of the Government shall be divided into three seperate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

[5] Article III, section 3, of the Oregon Constitution, provides in part:

"(1) The Legislative Assembly is authorized to establish by law a joint committee composed of members of both houses of the Legislative Assembly, the membership to be as fixed by law, which committee may exercise, during the interim between sessions of the Legislative Assembly, such of the following powers as may be conferred upon it by law[.]"

The enumerated powers include the power, in an emergency, to allocate funds to state agencies, to authorize state agencies to expend funds already allocated but in excess of agency budgets, and to revise or amend the budgets of state agencies; and the power to approve, or revise and approve, budgets for new activities. *Id.* at § 3(1)(a) to (d).

[6] Article IV, section 25, of the Oregon Constitution, provides:

"A majority of all the members elected to each House shall be necessary to pass every bill, or Joint resolution; and all bills, and Joint resolutions so passed, shall be signed by the presiding officers of the respective houses."

[7] Article V, section 15b, of the Oregon Constitution, provides in part:

"(1) Every bill which shall have passed the Legislative Assembly shall, before it becomes a law, be presented to the Governor; if the Governor approve, the Governor shall sign it; but if not, the Governor shall return it with written objections to that house in which it shall have originated[.]"

[8] Article I, section 8, clause 3, of the Constitution of the United States, provides:

"The Congress shall have Power * * * To regulate Commerce * * * among the several States[.]"

ORS 459.298] subjects DEQ's surcharge determination to Emergency Board approval," that statute is unconstitutional under Article III, sections 1 and 2,[9] and Article IV, section 25, of the Oregon Constitution. DEQ argues, however, that that portion of the statute is severable and that the remainder of the statute and its accompanying regulations are valid under the Oregon Constitution and under the Commerce Clause, Article I, section 8, clause 3, of the Constitution of the United States.

The Court of Appeals accepted DEQ's concession as to the unconstitutionality of the portion of ORS 459.298 relating to approval of the surcharge by the Emergency Board, concluding that that portion violates Article III, section 3, of the Oregon Constitution. *Gilliam County v. Dept. of Environmental Quality*, 114 Or App 369, 375-76, 837 P2d 965 (1992). The Court of Appeals concluded that the portion of ORS 459.298 relating to approval of the surcharge by the Joint Committee on Ways and Means also is unconstitutional, because it violates Article IV, section 25, of the Oregon Constitution. *Id.* at 379-80. The court held, however, that those portions of the statute are severable and that "the language that remains after both approval provisions are deleted is still a workable statute that contains clear standards for EQC to follow." *Id.* at 378, 382-383. Next, the Court of Appeals held that OAR 340-61-115(1)

[9] Article III, section 2, of the Oregon Constitution, provides:

> "The Legislative Assembly shall have power to establish an agency to exercise budgetary control over all executive and administrative * * * agencies of the State Government."

and 340-61-120(6) do not violate the Commerce Clause, because the surcharge imposed on out-of-state waste is a permissible "compensatory fee for specific costs incurred by the state" in the disposal of that waste and because, under the scope of review granted to the court by ORS 183.400, the court could not say that the amount of that fee either impermissibly exceeds those state costs or is insufficiently related to the services provided by the state in relation to disposal of out-of-state waste. *Id.* at 383-88. We affirm the decision of the Court of Appeals.

We begin by considering petitioners' state law claims. *See State v. Kennedy*, 295 Or 260, 262, 666 P2d 1316 (1983) (court decides questions of state law before reaching federal constitutional issues). Further, "[t]his court follows the principle that constitutional issues should not be decided when there is an adequate statutory basis for a decision." *Planned Parenthood Assn. v. Dept. of Human Resources*, 297 Or 562, 564, 687 P2d 785 (1984).

In a challenge to a regulation under ORS 183.400(4), this court first decides whether the regulation was promulgated according to applicable rulemaking procedures. ORS 183.400(4)(c). We then decide whether the promulgation of the regulation was within the jurisdictional authority of the promulgating agency and whether the substance of the regulation neither departed from the legal standard expressed or implied in the enabling statute, nor contravened any other applicable statute. ORS 183.400(4)(b). Only after determining that the regulation meets those requirements do we consider the question whether the regulation violates any provision of the Oregon or United States Constitution.

ORS 183.400(4)(a). *See Planned Parenthood Assn. v. Dept. Of Human Resources, supra*, 297 Or at 565 (setting forth that three-part analysis).

First, petitioners make no contention that the challenged regulations were "adopted without compliance with applicable rulemaking procedures," namely, the rulemaking procedures established by ORS 459.298. ORS 183.400(4)(c).

Next, as petitioners concede, EQC had jurisdictional authority to promulgate OAR 340-61-115(1) and 340-61-120(6). Petitioners do not contend that those regulations depart from the legal standards expressed or implied in the authorizing statute, ORS 459.298.

Petitioners contend, however, that, because the regulations include the cost of out-of-state waste reduction certification as a component of the surcharge, they contravene ORS 459.305. We disagree. ORS 459.305(1) provides that disposal sites may not accept waste generated outside the county in which the site is located unless DEQ certifies that the latter area has implemented a recycling program. ORS 459.305(4) permits DEQ to establish, according to the rulemaking procedures provided in ORS 468.065, a certification fee in relation to that requirement. Nothing in ORS 459.305 or 468.065 prohibits DEQ from including the cost to the state of certifying out-of-state waste reduction programs as a component of the surcharge authorized under ORS 459.298.

For the above reasons, we conclude that OAR 340-61-115(1) and 340-61-120(6) are not invalid under ORS 183.400(4)(b) in any of the particulars urged by petitioners.

We thus reach the question whether OAR 340-61-115(1) and 340-61-120(6) violate any provisions of the Oregon or United States Constitutions, ORS 183.400(4)(a), and turn to petitioners' state constitutional claim. We begin by asking whether, as petitioners allege, the statute in accordance with which those regulations were promulgated is itself impermissible in relation to any provision of the Oregon Constitution. *See* ORS 183.400(3)(b) (judicial review of rule includes examination of statutory provisions authorizing the rule).

As did the Court of Appeals, we conclude that ORS 459.298 is unconstitutional in two respects. First, as respondent concedes, ORS 459.298 is constitutionally impermissible insofar as it requires approval of EQC's rules by the Emergency Board. Second, the statute is constitutionally impermissible insofar as it requires approval of EQC's rules by the Joint Committee on Ways and Means. As written, ORS 459.298 requires either the Emergency Board (in the interim between legislative sessions) or the Joint Committee on Ways and Means (during sessions of the Legislative Assembly) to approve the rules before they can become legally effective. That requirement gives the Emergency Board or the Joint Committee on Ways and Means the right to veto the rules. But, a veto is a legislative act, and a legislative act by less than a majority vote of each chamber is unconstitutional. *See* Or Const, Art III, § 3, set out in part at note 5, *supra* (authorizing establishment of Emergency Board with certain enumerated powers, not including the power to approve or disapprove the rules at issue in this case); Or Const, Art IV, § 25, set out in part at note 6, *supra* (legislation must be passed by a majority of all members of each

house of the Legislative Assembly and signed by the presiding officers of the respective houses); Or Const, Art V, § 15b, set out in part at note 7, *supra* (legislative enactments must be presented to Governor and either signed by her or returned to legislature with written objections). *See also INS v. Chadha*, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317 (1983) (a provision of the Immigration and Nationality Act that authorized *either* house of Congress, by resolution, to veto a decision of the Executive Branch to allow a deportable alien to remain in the United States was unconstitutional; citing Article I, sections 1 and 7, of the Constitution of the United States, the Court held that the challenged provision violated the principle of separation of powers and allowed a legislative veto by less than a vote of each chamber).

Nevertheless, the statute as a whole need not be invalidated if the portions that have been found constitutionally impermissible are severable from the remainder. The severability of unconstitutional portions of a statute is governed by ORS 174.040, which provides:

> "It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:
>
> "(1) The statute provides otherwise;
>
> "(2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or

> "(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent."

Nothing in the text of ORS 459.298 provides that, if any part of that statute were held to be unconstitutional, the remaining parts should not remain in force. *See* ORS 174.040(1), *supra*.

Neither are the portions of ORS 459.298 relating to the establishment of the surcharge by EQC and to the bases of that surcharge "so essentially and inseparably connected with and dependent upon" the approval portions of the statute that it is apparent, either from the text or from the legislative history of the statute, that the former parts would not have been enacted without the latter. *See* ORS 174.040(2), *supra*. ORS 459.298 is part of a comprehensive statutory scheme of regulating solid waste, which includes many sections authorizing public bodies to impose fees to recover their costs.[10] The overriding

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[10] Those include: ORS 459.053(9) (DEQ—fees to repay department costs and fund operation and maintenance of a department-owned landfill disposal site); ORS 459.125(1)(d) (Marion County—fees to control and regulate disposal, transfer, and resource recovery sites located in the county); *former* ORS 459.170(1)(g) (renumbered 459A.025 in 1991) (EQC—fees to carry out various provisions of the chapter); *former* ORS 459.200(7)(b) (renumbered 459A.085 in 1991) (cities and counties—fees from persons holding collection service franchises); ORS 459.235 (fee for permit to operate a disposal site); ORS 459.236 (permit fees imposed on all disposal sites to pay for removal or remediation of hazardous substances); ORS 459.284 (permit fees that are imposed on governmental unit that has a disposal site to be used for rehabilitation and enhancement of the area around the site); *former* ORS 459.294 (renumbered 459A.110 and amended by Or Laws 1991, ch 385, § 91) and *former* ORS 459.295 (renumbered 459A.120 in 1991) (EQC—schedule of fees for

purpose of ORS 459.298, as revealed by its text and context, is to permit the establishment and collection of fees.

We also note, as did the Court of Appeals, the pertinent legislative history. The committee that considered HB 3515, which became Oregon Laws 1989, chapter 833, and which included the challenged provision, was told that "the Emergency Board does not have the approval authority[,] * * * it is a review and comment only." The committee instructed its staff to use "the toughest language we can have for E-Board control over the fee," but the legislature did not add a nonseverability provision. Tape Recording, Ways and Means Committee Subcommittee on Transportation and Regulation, June 24, 1989, Tape 155, Side B.

The legislature's permissible choice was between having no surcharge on the disposal of solid waste generated out of state and having a surcharge established by EQC without a veto by the Emergency Board or Joint Committee on Ways and Means. As between the two, we believe that the legislature intended to have a surcharge.

Finally, ORS 459.298 is neither incomplete, nor incapable of being executed, in the absence of the ap-

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receipt of domestic solid waste; to be used to reduce environmental risks at waste disposal sites); ORS 459.305(4) (fee for certification that a governmental unit has implemented recycling opportunity provisions); ORS 459.310 (local governments can impose surcharge on solid waste received at regional disposal sites); ORS 459.311 (local governments must charge for remedial action or removal at solid waste disposal site); ORS 459.335 (user fees set by metropolitan service district); and ORS 459.509 to 459.765 (fees for sale of new tires and disposal of waste tires).

proval portions of the statute. *See* ORS 174.040(3), *supra.*

The portions of ORS 459.298 relating to approval of the surcharge by the Emergency Board or the Joint Committee on Ways and Means, being unconstitutional and severable, are deleted from the statute. The remaining portions of the statute shall continue in force.

Petitioners have made no other challenges under the Oregon Constitution to OAR 340-61-115(1) and 340-61-120(6), beyond those already discussed. We turn, therefore, to petitioners' claim that ORS 459.298, OAR 340-61-115(1), and OAR 340-61-120(6) impermissibly discriminate against interstate commerce in violation of Article I, section 8, clause 3, of the Constitution of the United States. For the following reasons, we conclude that they do not.

The Commerce Clause grants to Congress the power to regulate commercial transactions among the states, subject to the specific guarantees of the Constitution of the United States. By that grant of power to Congress, the Commerce Clause implicitly "limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, —— US ——, 112 S Ct 789, 800, 117 L Ed 2d 1 (1992); *see also New Energy Co. of Indiana v. Limbach*, 486 US 269, 273, 108 S Ct 1803, 100 L Ed 2d 302 (1988) (stating that principle). As the Supreme Court of the United States has explained, "[t]his 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach, supra*, 486 US at 273-74.

Consistent with that proscription, states may not enact laws that discriminate against articles of commerce [11] coming from outside the state unless there is some reason, apart from their origin, for treating those articles differently. *City of Philadelphia v. New Jersey*, 437 US 617, 626-27, 98 S Ct 2531, 57 L Ed 2d 475 (1978). *Cf. Chemical Waste Management v. Hunt*, —— US ——, 112 S Ct 2009, 2013-15, 119 L Ed 2d 121 (1992) (where the only discernible basis for an additional fee imposed on out-of-state waste was the origin of the waste, "invalidity under the Commerce Clause necessarily follows"). The burden is on the state to show that a differential charge "'is demonstrably justified by a valid factor unrelated to economic protectionism.'" *Id.* at 2015 (quoting *Wyoming v. Oklahoma*, *supra*, 112 S Ct at 801). *See Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, —— US ——, 112 S Ct 2019, 119 L Ed 2d 139 (1992) (holding invalid on Commerce Clause grounds a Michigan statute prohibiting landfills from accepting solid waste generated outside the county in which the landfill was located, unless the acceptance of such waste was explicitly authorized by the receiving county; after rejecting the state's argument that the restriction was justified on the ground that it treated waste from other Michigan counties no differently than waste from other states, and its argument that the statute constituted a "comprehensive health and safety regulation rather than 'economic protectionism,'" the Court concluded that the state failed to advance "any legitimate reason for allowing [landfills] to accept waste from inside the county but not waste from outside the county").

[11] "Solid waste, even if it has no value, is an article of commerce" for Commerce Clause purposes. *Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, —— US ——, 112 S Ct 2019, 2023, 119 L Ed 2d 139 (1992); *see also Chemical Waste Management v. Hunt*, —— US ——, 112 S Ct 2009, 2012 n 3, 119 L Ed 2d 121 (1992) (same); *City of Philadelphia v. New Jersey*, 437 US 617, 622-23, 98 S Ct 2531, 57 L Ed 2d 475 (1978) (same).

We apply those principles to the statutes and regulations at issue here. ORS 459.297 requires EQC to promulgate regulations establishing a surcharge on the disposal of out-of-state solid waste. ORS 459.298 requires EQC to base the amount of that surcharge on the "costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for" under other waste disposal programs, including costs arising from permit issuance, management, monitoring, and closure activities at disposal sites accepting out-of-state waste. On their face, OAR 340-61-115(1) and 340-61-120(6) purport to comply with those statutory mandates.

Because of the express nexus to actual costs incurred, we conclude that the surcharge authorized by ORS 459.297 and 459.298, and established by OAR 340-61-115(1) and 340-61-120(6), does not, on its face, constitute discrimination against an article of commerce, the origin of which is outside the state. There is a discernible basis for the surcharge apart from that origin. *See City of Philadelphia v. New Jersey*, *supra*, 437 US at 626-27 (establishing that test). Through the statutory and regulatory criteria, the state has met its burden of showing that the surcharge "is demonstrably justified by a valid factor unrelated to economic protectionism." *Chemical Waste Management v. Hunt*, *supra*, 112 S Ct at 2015.

We further conclude that, rather than being a constitutionally impermissible burden on out-of-state economic interests, *New Energy Co. of Indiana v. Limbach*, *supra*, the surcharge imposed on out-of-state waste by ORS 459.298 and its implementing regulations constitutes a "compensatory" fee for specific costs incurred by the state in the regulation of that waste. *See Commonwealth Edison v. Montana*, 453 US 609, 621-22, 622 n 12, 101 S Ct 2946, 69 L Ed 2d 884 (1981) (describing such fees). A law imposing a compensatory fee for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce is *prima facie* reasonable. *Great Northern Ry. Co. v. Washington*, 300 US 154, 160, 57 S Ct 397, 81 L Ed 573 (1937). Such a law violates the Commerce Clause only where the amount of the fee is "manifestly disproportionate to the services rendered." *Clark v. Paul Gray, Inc.*, 306 US 583, 599, 59 S Ct 744, 83 L Ed 1001 (1939). *See Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 US 707, 92 S Ct 1349, 31 L Ed 2d 620 (1972) (fees reflecting a fair approximation of the use of facilities and not excessive in relation to costs incurred do not violate the Commerce Clause); *Ingles v. Morf*, 300 US 290, 294, 57 S Ct 439, 81 L Ed 653 (1936) (a fee burdening interstate commerce may be justified by showing that it constitutes "reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce").

Petitioners contend that, even assuming that *some* fee could be imposed without offending the Commerce Clause, the present fees do offend the Commerce Clause, because they are "disproportionate." Such a claim cannot be adjudicated in the present proceed-

ing. Our scope of review under ORS 183.400 precludes us from deciding whether the surcharge is impermissible as "disproportionate" to the services rendered or to the costs incurred by the State of Oregon in connection with permitting waste disposal sites to accept solid waste generated out of state, because those are factual inquiries. As this court noted in *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 79, 843 P2d 409 (1992), "judicial review under ORS 183.400 is limited to the face of the rule and the law pertinent to it. Numerous individual fact situations can arise under any rule, but judicial review of the rule as applied to each of those situations is reserved to other forums." Similarly, petitioners' claim of disproportionality may not be addressed in this proceeding under ORS 183.400.

The decision of the Court of Appeals is affirmed.

APPENDIX B

FILED: July 22, 1992

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

GILLIAM COUNTY, OREGON and
OREGON WASTE SYSTEMS, INC., PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF OREGON, RESPONDENT

COLUMBIA RESOURCE COMPANY L.P.,
a Washington Limited Partnership, PETITIONER

v.

ENVIRONMENTAL QUALITY COMMISSION, RESPONDENT

(CA A68441 (Control) & CA A68455)
(Cases Consolidated)

Judicial Review of Administrative Rules.

Argued and submitted September 6, 1991.

J. Laurence Cable, Portland, argued the cause for petitioners Gilliam County, Oregon, and Oregon Waste Systems, Inc. With him on the brief were

James E. Benedict, Donald A. Haagensen, Hill, Huston, Cable, Ferris & Haagensen, Timothy V. Ramis, Jeff Bachrach, and O'Donnell, Ramis, Crew & Corrigan, Portland.

John A. DiLorenzo, Jr., Portland, argued the cause for petitioner Columbia Resource Company, L.P. With him on the brief was O'Connell, Goyak & DiLorenzo, Portland.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Buttler, Presiding Judge, and Rossman and De Muniz, Judges.

DE MUNIZ, J.

Rules held valid.

DE MUNIZ, J.

Petitioner Oregon Waste Systems, Inc. (OWS), owns and operates a regional solid waste disposal facility known as the Columbia Ridge Recycling Center and Landfill. It is located southwest of Arlington in Gilliam County. OWS disposes of waste generated in Oregon and also waste generated outside of Oregon. The operation provides direct and indirect benefits to petitioner Gilliam County as a result of employment in the county and the payment of local fees and taxes.

Petitioner Columbia Resource Company, L.P. (CRC), has a 20-year contract with Clark County, Washington, under which it disposes of solid waste

originating there. CRC uses the Finley Buttes Landfill in Morrow County as its disposal site. The operator of the Finley Buttes Landfill passes through to CRC the costs incurred for disposal, including charges made by respondent Department of Environmental Quality (DEQ).

Petitioners challenge the constitutionality of two DEQ rules that the Environmental Quality Commission (EQC) adopted in December, 1990, OAR 340-61-115(1); OAR 340-61-120(6), and the enabling statutes that established the legal standards and procedures for adoption of those rules. ORS 459.297; ORS 459.298. The portions of the rules that petitioners challenge impose a surcharge for in-state disposal of garbage generated out-of-state.[1]

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[1] Pertinent parts of the rules provide:

"Beginning July 1, 1984, each person required to have a Solid Waste Disposal Permit shall be subject to a three-part fee consisting of a filing fee, an application processing fee and an annual compliance determination fee as listed in OAR 340-61-120. In addition, each disposal site receiving domestic solid waste shall be subject to an annual recycling program implementation fee as listed in OAR 340-61-120, and a per-ton fee on domestic solid waste as specified in section (5) of this rule. In addition, each disposal site or regional disposal site receiving solid waste generated out-of-state shall pay a surcharge as specified in section (6) of this rule." OAR 340-61-115 (1).

"Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state solid waste received at the disposal site." OAR 340-61-120(6).

In 1989, the legislature enacted Oregon Laws 1989, chapter 833, an amalgamation of several bills dealing with waste reduction. Section 155, codified as ORS 459.297, provides that every person who disposes of solid waste that was generated out-of-state must pay a surcharge to help meet the cost to the state of administering the solid waste program.[2] Section 156, codified as ORS 459.298, enables EQC to establish the amount of the surcharge.[3] The rules

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[2] ORS 459.297 provides:

"(1) Beginning on January 1, 1991, every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall pay a surcharge as established by the Environmental Quality Commission under ORS 459.298. The surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

"(2) The surcharge collected under this section shall be deposited in the State Treasury to the credit of an account of the Department of Environmental Quality. Such moneys are continuously appropriated to the department to meet the costs of the department in administering the solid waste program under ORS 459.005 to 459.426, 459.705 to 459.790 and 459A.005 to 459A.665."

[3] ORS 459.298 provides:

"Subject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297. The amount of the surcharge shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for under the provisions of ORS 459.235 and ORS 459.297, 459.298, 459.411 to 459.417, 459A.100 to 459A.120 and sections 70

impose on the disposal site a surcharge of $2.25 per ton for out-of-state waste that the site receives. The surcharge imposed at the disposal site for waste generated within Oregon is capped at $.50 per ton. *Former* ORS 459.294(5).[4]

The Oregon Supreme Court has explained that, before we can reach constitutional issues under ORS 183.400,[5] we must first determine: (1) whether the agency had the general authority to make that kind of rule; (2) whether the agency followed the procedures prescribed by statute or regulation; and (3) whether the substance of the rule departed from the legal standard expressed or implied in the enabling legislation or contravened some other applicable statute. *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984).

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to 73, chapter 833, Oregon Laws 1989. These costs may include but need not be limited to costs incurred for:

"(1) Solid waste management;

"(2) Issuing new and renewal permits for solid waste disposal sites;

"(3) Environmental monitoring;

"(4) Ground water monitoring; and

"(5) Site closure and post-closure activities."

[4] ORS 459.294 was renumbered ORS 459A.110 in 1991. Or Laws 1991, ch 385, § 91.

[5] ORS 183.400(4) provides:

"The court shall declare the rule invalid only if it finds that the rule:

"(a) Violates constitutional provisions;

"(b) Exceeds the statutory authority of the agency; or

"(c) Was adopted without compliance with applicable rulemaking procedures."

"These steps are designed to assure that the challenged action, particularly an action challenged for arguably violating constitutional rights, in fact was authorized by the state's or local government's politically accountable policy makers. Only if the action was clearly so authorized is there any reason to decide whether the state or local government has adopted a policy that the constitution forbids." 297 Or at 565.

Petitioners do not contend that the agency did not have the general authority to make rules imposing surcharges on solid waste. They also make no meritorious arguments that the substance of the rules deviated from the legal standard provided in the statute [6] or that they contravened some other applicable statute.[7] Their procedural argument is that ORS

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[6] Gilliam County argues that the agency improperly considered various costs to include as components of the surcharge. It cites *Kids Against the Cut v. Wage and Hour Comm.*, 41 Or App 179, 597 P2d 1264 (1979), for the proposition that we must examine DEQ's "methodology to develop" those costs to determine whether the agency "failed to act in conformance with the enabling statute." That infers too much from *Kids Against the Cut*. In that case, we held only that we may look at the record to see whether the agency made a determination on which its authority to act was predicated, not that we may consider whether the method used to reach that determination was correct.

[7] Petitioners assert in one short paragraph that EQC violated ORS 459.305 by including in the surcharge $0.05 per ton for what EQC calls "solid waste reduction activities related to reviewing and certifying out-of-state waste reduction and recycling plans." They argue that certification fees may not be "lumped into the surcharge levied on all out of state waste," because they must be "set in accordance with ORS

459.298 requires the agency to follow a process that violates the Oregon Constitution and that the statute in its entirety is therefore invalid, so no rules could be made under it. They argue in the alternative that, if the procedures are permissible, then the rules are

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486.065," which they believe requires the fee to be set by a rule after a hearing. Moreover, they observe, the fee is "subject to review of the Executive Department and the prior approval of the appropriate legislative review agency." ORS 459.305(4).

Even assuming, without deciding, that ORS 459.305 is the exclusive source of authority for EQC to assess the certification fee, we see nothing in the statute that prohibits the agency from considering that fee at the same time that it considers the surcharge and nothing that requires the fee to be established by a separate rule, rather than as a component part of a more general rule. We also see nothing in ORS 468.065 (*since amended by* Or Laws 1991, ch 752, § 15) that requires the certification fee to be set by a rule after a hearing. Subsection (1) pertains only to permits issued under various sections of ORS chapters 448, 454 and 468. Subsection (2) pertains only to fees for permits issued pursuant to the specified sections that govern water and air pollution sources. Subsection (3) describes the costs that the agency may consider in determining fees for certification of hydroelectric power projects. Subsection (5) applies only to the specified sections of chapters 448, 454 and 468. Subsections (4) and (6) are the only subsections to which ORS 459.305 (4) *could* refer. The former provides that DEQ may require various documents and reports to be submitted by those who apply for permits; the latter merely addresses what must be done with the fees that the DEQ collects. Neither requires a separate rule or a hearing.

We also see no merit in petitioners' second argument under ORS 459.305(4). As far as we can tell, that subsection requires nothing different from the procedure specified under ORS 459.298. Petitioners do not explain any other way that we should read it, and we decline to try to create an argument for them.

invalid, because the agency did not follow those procedures. If the rules were made by a valid procedure, they argue, they are nonetheless invalid, because they impermissibly discriminate against interstate commerce in violation of the United States Constitution.

We turn first to the state law issues. *Planned Parenthood Assn. v. Dept. of Human Res., supra.* Under ORS 459.298, the amount of the surcharge is subject to approval by the Joint Committee on Ways and Means (Committee) during legislative sessions or by the Emergency Board during the interim. OWS argues that the grant of authority to the Emergency Board violates the state constitution. CRC agrees and argues that subjecting the rules to approval by the Committee is also unconstitutional. Both petitioners assert that the unconstitutional provisions render the statute unconstitutional and, therefore, that the rules promulgated under it are invalid. If the approval requirements are valid, they argue, then the rules are invalid, because EQC did not seek to obtain final approval from either authority.

Respondents concede, and we agree, that ORS 459.298 is unconstitutional to the extent that it subjects the surcharge determination to Emergency Board approval, because the Board has only the powers granted to it in Article III, section 3, of the Oregon Constitution. Art IV, §§ 1, 25. Those powers do not include the power to veto EQC's surcharge rule.[8]

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[8] No one has raised, and we do not decide, any issue about the validity of a statutory requirement that EQC *consult* the Emergency Board, any legislative committee or legislative counsel.

Respondents argue, however, that the language requiring Emergency Board approval is severable from ORS 459.298, that the statute is workable without that provision and that EQC followed the correct procedure by not obtaining final approval of the Board.

The starting point for deciding that issue is ORS 174.040, which states the legislative preference for severability:

> "It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:
>
> "(1) The statute provides otherwise;
>
> "(2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
>
> "(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent."

Petitioners contend that Emergency Board approval is essential to the remaining parts, because without it the statute cannot be executed in accordance with legislative intent.

The bills that comprised HB 3515, which became Oregon Laws 1989, chapter 833, had been referred first to subject matter committees to consider their substance and then to the Joint Committee on Ways and Means to consider their fiscal impacts. The Joint Committee on Ways and Means, the first committee

to consider HB 3515 as a whole, inserted the Emergency Board approval requirement without providing a detailed explanation for it. Petitioners rely on the history of other sections of the bill that also included Emergency Board oversight. On the basis of that history, they argue that "the overriding philosophy * * * was to maintain strict E-Board control over fees of various agencies" and that the legislature would not have enacted the statute without that control.

The history cited by petitioners shows that members of the Committee were informed that, legally, the Emergency Board could review and comment on the surcharges, but that it did not have approval authority. During consideration of the State Fire Marshall's authority to establish a fee schedule relating to hazardous wastes,[9] a legislative committee staff member, Acuff, commented:

> "Mr. Chairman, I believe that legislative counsel will tell you that the Emergency Board does not have the approval authority * * * that it is a review and comment only."

The response of the chair, Representative Hanlon, was to instruct staff to include control "to the extent authorized by law."

The history also demonstrates that inclusion of Emergency Board review was intended to permit the exertion of political, even if not legal, pressure:

> "Acuff: "Well, I think you're accomplishing your objective * * *. I think you're accomplish-

[9] The quotations are from Tape Recording, Ways and Means Subcommittee on Transportation and Regulation regarding HB 3515, June 24, 1989, 155B.

ing the objective that you want now in limiting the dollars that you have in your first four decisions. You're forcing the fee structure as it is and they will come back to you and prove that [to] you either to the E-Board or to the Assembly.

"Rep. Jones: Except that * * * if [the Fire Marshall does not prove the need to the Emergency Board to increase fees] they go ahead and do it anyway.

"Acuff: I doubt that the Fire Marshall would go ahead and do it anyway.

"Rep Hanlon: So do I. We will be breaking for a quick lunch at 12:30 * * * half an hour or so. Up to the lounge and get some cornflakes. I would like to see the amendment. I'm not sure because I wasn't listening to the whole thing, but I think Representative Jones and I agree the amendment should be made to the fullest extent possible to control the imposition of those fees. And that means that the E-Board * * * whoever it is that's approving it in the legislature has the authority * * * that authority * * * whatever authority they have, they may, may exercise at that point.

"Sen. Hill: Mr. Chairman.

"Rep. Hanlon: Larry.

"Sen. Hill: I'd agree. I'd ask that the committee request Sue to give us the toughest language we can have for E-Board control over the fee."

We infer from that discussion that the legislature wanted to exercise whatever authority it could over

the imposition of fees but that it understood that the Emergency Board might not have the power to overrule the agency. Nevertheless, it did not enact a nonseverability provision, as it presumably would have done had it intended to override the preference for severability contained in ORS 174.040.

With the unconstitutional provision granting approval authority to the Emergency Board omitted, the statute provides:

> "Subject to approval by the Joint Committee on Ways and Means during the legislative sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297."

The statute, so read, is restrictive in that it limits the approval requirement to when the legislature is in session. That does not render the statute unworkable. We conclude that the unconstitutional provision relating to Emergency Board authority is severable.

Read that way, however, the statute still requires EQC to submit the surcharge rules to the Committee for approval. CRC argues that that provision also violates the Oregon Constitution. It urges us to adopt the reasoning of *INS v. Chadha*, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317 (1983), which held unconstitutional a provision of the Immigration and Nationality Act of 1952, 8 USC §§ 1101 *et seq*, that purportedly authorized a one-house legislative veto of the Attorney General's determination that a particular deportable alien should not be deported. 8 USC § 1254(c)(2). Respondents do not directly respond to those arguments but, in the course of explaining that the Emergency Board provision is severable, they conclude that "without the offending

provision the statute simply provides that the agency shall set the rates." We assume, however, that respondents did not intend that to be an affirmative concession that the provision subjecting the rules to the approval of the Committee is also unconstitutional.

CRC argues that, even if approval of the surcharge is a legislative act,[10] the Committee cannot do it, because all bills must be approved by a majority of each house, Or Const, Art IV, § 25, and presented to the governor for signature. Or Const, Art V, § 15b.[11] The plain language of the statute provides that the rules are subject to approval of the *Committee*; it does not provide that the rules are subject to approval of the Legislative Assembly. The legislature has required approval of the Emergency Board or the "Legislative Assembly" before agency action can take

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[10] Respondents concede that, if approval of the surcharge rule is an executive act, then only the Executive Branch may approve. Or Const, Art III, § 1. They also do not argue that any part of the legislature could approve the surcharge, if approval is a judicial act.

[11] Article IV, section 25, provides:

> "A majority of all the members elected to each House shall be necessary to pass every bill, or Joint resolution; and all bills, and Joint resolutions so passed, shall be signed by the presiding officers of the respective houses."

Article V, section 15b(1), provides:

> "Every bill which shall have passed the Legislative Assembly shall, before it becomes a law, be presented to the Governor; if the Governor approve, the Governor shall sign it; but if not, the Governor shall return it with written objections to that house in which it shall have originated, which house shall enter the objections at large upon the journal and proceed to reconsider it."

effect in other contexts, but it did not use such language here. *See, e.g.*, ORS 341.565(4); ORS 537.805(4)(a).[12] Although the legislature has the undoubted authority to enact laws establishing charges, nowhere does the legislative history suggest that anyone thought that the provision required any action by the Legislative Assembly beyond review by the Committee. We therefore read the words "Joint Committee on Ways and Means" to signify that the legislature intended the approval process to be completed by the Committee without further legislative process.

If the statute were given effect as written, it would constitute a command by the legislature ordering EQC to propose legislation to be enacted by the Committee. Respondents concede that the power to enact or repeal laws is vested solely in the Legislative Assembly and that power cannot be delegated, even to a group of its own members. *See Marr v. Fisher et al.*, 182 Or 383, 388, 187 P2d 966 (1947); *Van Winkle v. Fred Meyer, Inc.*, 151 Or 455, 49 P2d

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[12] We note that several other 1989 enabling statutes that contained language requiring Committee or Emergency Board approval were amended in 1991. Those statutes now contain language similar to that in ORS 448.410(1)(d), which governs the adoption of fees to certify persons qualified to supervise the operation of sewage treatment works:

> "Subject to the prior approval of the Executive Department and a report to the Emergency Board prior to adopting the fee, * * *. The fees established * * * shall be within the budget authorized by the Legislative Assembly as that budget may be modified by the Emergency Board."

See also ORS 448.450(1)(d); ORS 453.408(3); ORS 465.385(2)(b).

1140 (1935); *see also* 31 Op Att'y Gen 161 (Or 1962-64). The Committee is composed of only 16 legislators, 8 from each house, ORS 171.555, and therefore could not constitute "[a] majority of all the members elected to each House." Or Const, Art IV, § 25. No laws can constitutionally be enacted by the process described in the statute.[13]

CRC argues that the approval provision is not severable from the statute for all the same reasons that Emergency Board approval is not severable. The starting point again is ORS 174.040. Because the legislature has expressed a strong general preference in favor of severability, we can find the Committee approval requirement not severable only if (1) it is apparent that the legislature would not have enacted the statute without that provision or (2) the resulting parts of the statute would be incomplete and incapable of being executed in accordance with legislative intent.

ORS chapter 459 contains over 40 pages devoted to the control of solid waste. The legislature found that "[t]here is a shortage of appropriate sites for landfills in Oregon," ORS 459.015(1)(c), and:

> "It is in the best interests of the people of Oregon to extend the useful life of existing solid waste disposal sites by encouraging recycling and reuse of materials whenever recycling its economically feasible, and by requiring solid

[13] We also note that, even if we were to construe the language to imply that the Committee would submit EQC's proposal to the Legislative Assembly, the statute would still establish a defective process, because all bills must originate in one of the houses and revenue bills must originate in the House of Representatives. Or Const, Art IV, § 18.

> waste to undergo volume reduction through recycling and reuse measures *before disposal in landfills* to the maximum extent feasible. Implementation of recycling and reuse measures will not only increase the useful life of solid waste disposal sites, but also decrease the potential public health and safety impacts associated with landfill operation." ORS 459.015(1)(d) (*since amended by* Or Laws 1991, ch 385, § 7). (Emphasis supplied.)

The legislative scheme was intended to establish a comprehensive system of regulation that provides for broad participation and cooperation among local governments and state agencies, "reserving to the state those functions necessary to assure effective programs, cooperation among local government units and coordination of solid waste management programs throughout the state." ORS 459.015(2)(c) (*since amended by* Or Laws 1991, ch 385, § 7). It delegated to EQC and DEQ the authority to adopt and enforce rules in order to implement and assure the effectiveness of the extensive regulatory plan. *See* ORS 459.025; ORS 459.045; ORS 459.376; ORS 459.385.

Chapter 459 contains a plethora of sections authorizing EQC, DEQ and local governments to impose fees and charges to recover costs at each step in the solid waste control program.[14] As in the stat-

[14] Those include: ORS 459.053(9) (DEQ—fees to repay department costs and fund operation and maintenance of a department owned landfill disposal site); ORS 459.125(1)(d) (Marion County—fees to control and regulate disposal, transfer and resource recovery sites located in the county); *former* ORS 459.170(1)(g) (renumbered 459A.025 in 1991) (EQC—fees to carry out various provisions of the chapter); *former*

utes at issue here, almost every delegation of authority to charge a fee is accompanied by an explanation of how the fee is to be calculated and how the funds collected are to be used. *See, e.g., former* ORS 459.170(2) (renumbered 459A.025(2) in 1991); *former* ORS 459.200(8) (renumbered 459A.085 in 1991); ORS 459.235(2); ORS 459.236(5); ORS 459.284; ORS 459.335. That careful structuring of fees demonstrates that the legislature wanted to ensure that the costs of each protective activity would be borne by those who had created the need for it. It clearly wished to avoid spreading among all Oregonians the costs of mitigating environmental risks that they did not create.

Although the Committee was reluctant to delegate final authority to EQC to establish the surcharge,

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ORS 459.200(7)(b) (renumbered 459A.085 in 1991) (cities and counties—fees from persons holding collection services franchises); ORS 459.235 (fee for permit to operate a disposal site); ORS 459.236 (permit fees imposed on all disposal sites to pay for removal or remediation of hazardous substances); ORS 459.284 (permit fees that are imposed on governmental unit that has a disposal site to be used for rehabilitation and enhancement of the area around the site); *former* ORS 459.294 (renumbered 495A.110 and amended by Or Laws 1991, ch 385, § 91) and *former* ORS 459.295 (renumbered 459A.120 in 1991) (EQC—schedule of fees for receipt of domestic solid waste; to be used to reduce environmental risks at waste disposal sites); ORS 459.305(4) (fee for certification that a governmental unit has implemented recycling opportunity provisions); ORS 459.310 (local governments can impose surcharge on solid waste received at regional disposal sites); ORS 459.311 (local governments must charge for remedial action or removal at solid waste disposal site); ORS 459.335 (user fees set by metropolitan service district); and ORS 459.509-ORS 459.765 (fees for sale of new tires and disposal of waste tires).

that reluctance was insufficient to motivate it to include in the statute a non-severability clause. *See, e.g., INS v. Chadha, supra*, 462 US at 932. From that fact, the extensiveness of the regulatory scheme, the detail with which the authority was delegated and the nature of the overall fee structure that the chapter creates, we conclude that the legislature would have enacted ORS 459.297 and ORS 459.298 even if it had known that neither the Committee nor the Emergency Board could have the power to veto the resulting rules.[15] The language that remains after both approval provisions are deleted is still a workable statute that contains clear standards for EQC to follow.

After EQC drafted the rule that established the fee, it submitted it to the Emergency Board. The Board instructed EQC that the fee had been set too high for reasons that we need not examine. EQC then redrafted the rule to require a slightly lower fee. It did not, however, submit the amended rule to the Emergency Board or to the Committee for final approval. Strictly speaking, EQC did not follow the procedure prescribed in the statute. The rule is not invalid on that ground, however, because the portion of the statutory procedure that the agency failed to follow is unconstitutional. It would be perverse, indeed, to hold a rule invalid on the ground that the agency did not follow a constitutionally impermissible

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[15] Even without the power to veto administrative rules, the legislature retains oversight by virtue of ORS 171.572, which provides:

> "The Legislative Counsel shall review administrative rules adopted or proposed for adoption by state agencies. Such review shall be in accordance with the provisions of ORS 183.710 to 183.725."

procedure. No one has otherwise challenged the validity of the procedure that EQC actually employed.

Petitioners contend that OAR 340-61-115(1) and OAR 340-61-120(6) violate the Commerce Clause, Article I, section 8, clause 3, of the United States Constitution [16] by imposing a higher surcharge for garbage received from out-of-state haulers than that received from in-state haulers.[17]

The Commerce Clause grants Congress the power to regulate commerce among the states. Unless Congress precludes it, states may make laws that affect persons engaged in interstate commerce. However, states cannot enact laws that discriminate against articles of interstate commerce "unless there is some reason, apart from their origin, to treat them differently." *City of Philadelphia v. New Jersey*, 437 US

[16] Article I, section 8, clause 3, of the United States Constitution provides:

"The Congress shall have Power * * *
"* * * * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[17] The rules require Oregon landfill operators to remit the surcharge to DEQ, but do not require them to exact the surcharge from out-of-state haulers. Accordingly, a landfill operator can pass the surcharge on to in-state as well as out-of-state haulers in the form of uniformly increased dumping fees. Nevertheless, because it is interstate commerce that gives rise to the obligation to pay the surcharge, the rules are subject to scrutiny under the Commerce Clause. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Nat'l Res.*, —— US ——, 112 S Ct 2019, —— L Ed 2d —— (1992); *Evansville Airport v. Delta Airlines*, 405 US 707, 714, 92 S Ct 1349, 31 L Ed 2d 620 (1972); *Pickard v. Pullman Southern Car Co.*, 117 US 34, 6 S Ct 635, 29 L Ed 785 (1886).

617, 627, 98 S Ct 2531, 57 L Ed 2d 475 (1978); *see also Chemical Waste Management, Inc. v. Hunt*, —— US ——, 112 S Ct 2009, —— L Ed 2d —— (1992); *Fort Gratiot Sanitary Landfill, Inc., v. Michigan Dept. Nat'l Res., supra*, n 17; *New Energy Co. of Indiana v. Limbach*, 486 US 269, 273, 108 S Ct 1803, 100 L Ed 2d 302 (1988). States cannot benefit in-state interests by burdending out-of-state interests. *New Energy Co. of Indiana v. Limbach, supra*, 486 US at 273; *see also Wyoming v. Oklahoma*, —— US ——, 112 S Ct 789, 800, 117 L Ed 2d 1 (1992).

The rules at issue here, by the express language of ORS 459.298, exact a compensatory fee for specific costs incurred by the state. They exact a per-ton surcharge on landfill operators who accept refuse from out-of-state haulers. ORS 459.297 provides that those funds are appropriated to DEQ to meet the costs that it incurs in administering the solid waste program. ORS 459.298 provides that the amount of the surcharge must be based on the costs to the state and its political subdivisions of disposing of solid waste generated out-of-state. Those may include, but are not limited to, costs associated with solid waste management, permit issuance, environmental monitoring, ground water monitoring and site closure. They may not include costs that are paid under other provisions in the chapter. The rules implement those statutory directives.

Laws that impose compensatory fees [18] are

[18] A compensatory fee is not the same thing as a "compensatory tax," which is a general revenue measure that is intended to equalize the tax burden between substantially similar interstate and intrastate transactions. The classic example is a use tax imposed on goods purchased out of state

> "not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution. A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is prima facie reasonable." *Great Northern Ry. Co. v. State of Washington*, 300 US 154, 160, 57 S Ct 397, 81 L Ed 573 (1937). (Footnotes omitted.)

See also Commonwealth Edison Co. v. Montana, 453 US 609, 622 n 12, 101 S Ct 2946, 69 L Ed 2d 884 (1981). When that kind of law is challenged on Commerce Clause grounds, the challenger has the burden to show that the fee is excessive for the purpose for which it is collected, *Clark v. Paul Gray, Inc.*, 306 US 583, 599, 59 S Ct 744, 83 L Ed 1001 (1939), or that "there is no sufficient relation between the measure employed and the extent or manner of use" of the state provided service. *Interstate Transit, Inc. v. Lindsey*, 283 US 183, 190, 51 S Ct 380, 75 L Ed 953 (1931).[19]

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that is equivalent to the sales tax that would have been generated had those goods been purchased in state. *See Henneford v. Silas Mason Co.*, 300 US 577, 57 S Ct 524, 81 L Ed 814 (1937). Such taxes permit an individual faced with the choice of an in-state or out-of-state purchase to make that choice without regard to the tax consequences. *Boston Stock Exchange v. State Tax Comm'n*, 429 US 318, 330, 97 S Ct 599, 50 L Ed 2d 514 (1977). Accordingly, when a state enacts a valid compensatory tax, it does not discriminate against interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 97 S Ct 1076, 51 L Ed 2d 326 (1977); *see also Maryland v. Louisiana*, 451 US 725, 759-60, 101 S Ct 2114, 68 L Ed 2d 576 (1981).

[19] Petitioners argue that we should apply the reasoning in a number of cases that address discriminatory health and general welfare laws and general revenue measures. Regula-

In *Interstate Busses Corp. v. Blodgett*, 276 US 245, 48 S Ct 230, 72 L Ed 551 (1928), a state law had assessed a per-mile user fee on busses engaged in interstate commerce but did not assess that fee on those engaged in intrastate commerce. The Court first recognized that a state may impose a reasonable

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tions that control conduct to protect some aspect of the health or general welfare of a state's citizens are valid when preservation of health or welfare is the law's true purpose and the means chosen to achieve that objective does not unduly burden interstate commerce. *Maine v. Taylor*, 477 US 131, 106 S Ct 2440, 91 L Ed 2d 110 (1986); *Pike v. Bruce Church, Inc.*, 397 US 137, 142, 90 S Ct 844, 25 L Ed 174 (1970). However, if the actual purpose or effect of a health or welfare regulation is economic or resource protectionism, the law may be invalid. *See, e.g., Wyoming v. Oklahoma, supra*; *Hunt v. Washington State Apple Advertising Comm.*, 432 US 333, 97 S Ct 2434, 53 L Ed 2d 383 (1977); *Dean Milk Co. v. City of Madison*, 340 US 349, 71 S Ct 295, 95 L Ed 329 (1951); *compare Maine v. Taylor, supra*, with *City of Philadelphia v. New Jersey, supra*. General revenue measures are taxes imposed to compensate the state for "providing police and fire protection, the benefit of a trained work force, and the advantages of a civilized society." *Commonwealth Edison Co. v. Montana, supra*, 453 US at 624. (Citations and internal quotations omitted.) A state can impose such a tax on those engaged in interstate commerce if it

> "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." *Complete Auto Transit, Inc. v. Brady, supra*, 430 US at 274.

When a law satisfies that standard, out-of-state interests pay their fair share of the costs of running the state.

The statutes and rules here neither regulate conduct nor impose taxes that support state government generally. The fees are based on and applied to the provision of a narrow range of state services that are directly connected to the activity on which the fees are imposed.

charge for the use of the facilities that it provides to those engaged in interstate commerce, roads, in that case. It then determined, from a facial review of the statutory scheme, that the funds generated were dedicated to financing those facilities. The Court sustained the validity of the fee, because the party challenging it failed to show that "the aggregate charge [bore] no reasonable relation to the privilege granted." 276 US at 252.

In *Clark v. Paul Gray, Inc., supra*, the state had exacted a "caravaning" fee for each automobile "operated on its own wheels, or in tow of a motor vehicle, for the purpose of selling or offering the same for sale * * * within or without [the] State." 306 US at 586. (Citation omitted.) The purpose of the fee was

> "to reimburse the State for expense [*sic*] incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits and to public safety upon the highways as affected by such operation." 306 US at 586. (Citation omitted.)

Because the law exempted cars moved exclusively within one of two zones that were roughly defined as the northern and southern halves of the state, the plaintiffs claimed that it unlawfully discriminated against interstate commerce. The Court disagreed. It first determined that the distinction that the state had made between intrazone and interzone traffic was permissible, because the state incurred a distinct burden by managing and facilitating the latter form of traffic and the intrazone traffic was already paying its fair share of costs of that commerce. The Court then recognized that the fees would offend the Commerce Clause if the plaintiffs showed that they were "excessive for the declared purposes." 306 US at 599. Because the fees did not appear, on their face, to be manifestly disproportionate to the services rendered, and the plaintiffs failed to present any other evidence of disproportionality, the Court sustained the validity of the fees. EQC's rules exact a compensatory fee for the distinct burden that the state incurs to regulate and facilitate disposal of out-of-state waste. Unlike the Michigan plan at issue in *Chemical Waste Management, Inc. v. Hunt, supra*, the rules impose a surcharge on in-state *and* out-of-state waste for the state services. The state might nevertheless be unlawfully discriminating if there is no reason, apart from its origin, to charge more for its services to manage and regulate out-of-state waste than it charges to manage and regulate in-state waste. The state, however, appears to have a reason apart from origin *per se* to treat out-of-state waste differently. It first encounters any out-of-state waste at the disposal site. In contrast, by the time in-state reaches the disposal site, it has already been subjected to state and local regulations and fees that are designed to reduce its volume and alter its character in order to limit the risks associated with dumping it on the ground. *See* n 14, *supra*. We cannot discern, from a facial review of the rules and legislation whether, in the aggregate, in-state garbage ultimately "pays" all of the costs that the state and its political subdivisions incur to manage and regulate its disposal. However, it does show that EQC is expressly forbidden to impose fees on out-of-state waste that exceed the costs of management of that waste. The legislature has made abundantly clear that it intends only to make "out-of-state generators pay their 'fair share' of the costs" and no

more. *Chemical Waste Management, Inc. v. Hunt, supra,* —— US at —— n 9. Therefore, before we could say that the rules are unconstitutional, petitioners would have to show that the fees are excessive for the purposes for which they are collected or that there is no sufficient relation between the measure employed and the extent or manner of use of the state provided service.

Petitioners brought this challenge under ORS 183.-400, which provides, in part:

> "(3) Judicial review of a rule shall be limited to an examination of:
>
> "(a) The rule under review;
>
> ("b) The statutory provisions authorizing the rule; and
>
> "(c) Copies of all documents necessary to demonstrate compliance with applicable rule-making procedures."

A facial review of the enabling legislation and the rules does not show that the fees are either excessive or unrelated to the state provided service. ORS 183.-400(3) does not permit us to consider the evidence that petitioners would have to produce to show that the fees are, nevertheless, manifestly disproportionate to the costs incurred by the state to manage and facilitate disposal of out-of-state waste. That kind of evidence can be considered only on review of an order in a contested case. ORS 183.482.

Rules held valid.

APPENDIX C

FILED: April 15, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

GILLIAM COUNTY, OREGON, and OREGON WASTE SYSTEMS, INC., PETITIONERS ON REVIEW

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, RESPONDENT ON REVIEW

COLUMBIA RESOURCE COMPANY, L.P., a Washington Limited Partnership, PETITIONER ON REVIEW

v.

ENVIRONMENTAL QUALITY COMMISSION,
RESPONDENT ON REVIEW

(DEQ 45-1990; CA A68441 (Control), A68455)
(cases consolidated)
(SC S39659, S39658)

APPELLATE JUDGMENT

In Banc

On review from the Court of Appeals.*

---

* Judicial review from the Department of Environmental Quality and the Environmental Quality Commission. 114 Or App 369, 837 P2d 965 (1992).

John DiLorenzo, Portland, attorney for petitioner on review Columbia Resource Company, L.P., J. Laurence Cable, and James E. Benedict Portland, attorneys for petitioner on review Oregon Waste Systems, Inc., James M. Coleman, Portland, waived argument for petitioner on review Gilliam County, Oregon,

Robert M. Atkinson, Assistant Attorney General, Salem, attorney for respondents on review.

GRABER, J.

The decision of the Court of Appeals is affirmed. Rules held valid.

Appellate Judgment SUPREME COURT

Effective Date: June 9, 1993 (seal)

APPENDIX D

Sections 459.297 and 459.298 of the Oregon Revised Statutes (1991) provide in pertinent part:

459.297 Surcharge on solid waste generated out-of-state. (1) Beginning on January 1, 1991, every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall pay a surcharge as established by the Environmental Quality Commission under ORS 459.298. The surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

(2) The surcharge collected under this section shall be deposited in the State Treasury to the credit of an account of the Department of Environmental Quality. Such moneys are continuously appropriated to the department to meet the costs of the department in administering the solid waste program under ORS 459.005 to 459.-426, 459.705 to 459.790 and 459A.005 to 459A.-665.

458.298 Amount of surcharge on solid waste generated out-of-state. Subject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297. The amount of the surcharge shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for under the provisions

of ORS 459.235 and 459.297, 459.298, 459.411 to 459.417, 459A.100 to 459A.120 and sections 70 to 73, chapter 833, Oregon Laws 1989. These costs may include but need not be limited to costs incurred for:

(1) Solid waste management;

(2) Issuing new and renewal permits for solid waste disposal sites;

(3) Environmental monitoring;

(4) Ground water monitoring; and

(5) Site closure and post-closure activities.

Oregon Administrative Rule 340-97-110 (formerly 340-61-115) provides in pertinent part:

(3) Out-of-state solid waste. In addition, each disposal site or regional disposal site receiving solid waste generated out-of-state shall pay a per-ton solid waste disposal fee as specified in Section 6 of OAR 340-97-120 or a surcharge as specified in Section 7 of OAR 340-97-120.

Oregon Administrative Rule 340-97-120 (formerly 340-61-120) provides in pertinent part:

(7) Surcharge on disposal of solid waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state solid waste received at the disposal site.

(a) This per-ton surcharge shall apply to all solid waste received after January 1, 1991.

(b) Submittal schedule: This per-ton surcharge shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th day of the month following the end of the calendar quarter.

(c) This surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

FILED
AUG 13 1993
OFFICE OF THE CLERK

No. 93-70 (2)
No. 93-108 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC.;
GILLIAM COUNTY, OREGON; AND
COLUMBIA RESOURCE COMPANY, L.P.,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF OREGON AND
ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON,

Respondents.

On Petitions for a Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENTS' BRIEF IN OPPOSITION

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22 pp

QUESTION PRESENTED

Assuming that the proceeding below and the record available for review are not too limited for meaningful resolution of the federal issue, the question presented would be:

> Whether a state surcharge on out-of-state solid waste constitutes a *per se* Commerce Clause violation even though the fee has an express nexus to actual costs incurred by the State and therefore has a discernible basis for its imposition apart from the origin of the waste.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC.; GILLIAM COUNTY, OREGON; AND COLUMBIA RESOURCE COMPANY, L.P.,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,

Respondents.

On Petitions for a Writ of Certiorari to the Supreme Court of the State of Oregon

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RESPONDENTS' BRIEF IN OPPOSITION

REASONS TO DENY THE WRIT

I. Introduction.

Petitioners have filed separate petitions for certiorari seeking review of the Oregon Supreme Court's decision in *Gilliam County v. Dept. of Environmental Quality*, 316 Or. 99, 849 P.2d 500 (1993) (*Gilliam County*).[1] In its decision, the Oregon Supreme

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[1]One petition is filed by Oregon Waste Systems, Inc. and Gilliam County, State of Oregon (No. 93-70). The other is filed by Columbia Resource Company, L.P. (No. 93-108). The State combines its response to the petitions. The essential issue presented by the two petitions is largely the same. The petitions differ primarily in that the petition filed by Columbia Resource Company raises arguments relating to an alleged "protectionist effect" of the challenged Oregon rule, arguments that were never presented to the Oregon

(continued...)

Court rejected a facial challenge to a state statute and administrative rule authorizing a surcharge on out-of-state solid waste deposited at Oregon landfills. The statute and the fee it authorizes are part of a comprehensive scheme regulating solid waste, which includes extensive provisions authorizing the recovery of costs at each step of the solid waste control program.[2] By statute, the fee is based on the actual costs to the State (and its political subdivisions) of disposing of out-of-state solid waste. These costs are not otherwise covered by fees and assessments relating to solid waste disposal generally, domestic solid waste disposal, and household hazardous waste disposal. *Id.*, 316 Or. at 102; Or. Rev. Stat. § 459.298.

The Oregon Supreme Court concluded that the fee has an "express nexus" to actual costs incurred and a discernible basis apart from the waste's point of origin. The court therefore concluded that the statutory fee does not, on its face and *per se*, impermissibly discriminate against interstate commerce. *Id.*, 316 Or. at 111–12. The state court left open the question whether the challenged fee might violate the Commerce Clause in other ways, as, for example, because the fee is higher than the actual costs incurred by disposal of out-of-state waste or is in some other way "disproportionate." *Id.*, 316 Or. at 112–13. The court concluded that the procedure invoked by petitioners to test the fee was too limited in form to reach such a challenge or any claim that might require a more fact-based inquiry or one that goes beyond the face of the administrative

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[1](...continued)

courts and that are not properly presented for the first time to this Court. *See* discussion *post* at p. 13 and n. 10.

[2]Both the Oregon Supreme Court and Oregon Court of Appeals opinions refer generally to the comprehensive scheme of which the challenged statute and rule are but a part. *See generally Gilliam County v. Dept. of Environmental Quality*, *supra*, 316 Or. at 109, n.10; *id.*, 114 Or. App. 369, 381–82, n.14, 837 P.2d 965 (1991).

rule establishing the fee and its authorizing statute. *Id.*, 316 Or. at 113.

The question decided by the Oregon Supreme Court is important to Oregon and possibly to other States. As this response will demonstrate, however, this is not the case in which, or the record on which, the question should be resolved for the first time by this Court. Below, petitioners availed themselves of a particularly expeditious and exceptionally narrow administrative procedure that began as an original declaratory action at the appellate court level. The case provides the Court with relatively little in the way of a factual record for review, and nothing in the way of an actual controversy between the parties over anything but the most academic of questions. The abstract and sterile posture of the case promises to raise more questions than it answers. The issues petitioners seek to have the Court resolve by granting certiorari in this case are better left to other lawsuits now in progress or to other cases in which this same question may later arise.

II. The Limitations of the Proceeding Below Render the Issue Presented Too Abstract for Meaningful Review.

The fee petitioners challenged in this case is a combined product of statute and administrative rule. The relevant statutes, Or. Rev. Stat. §§ 459.297 and 459.298, require the Oregon Environmental Quality Commission (EQC) to assess a surcharge on all solid waste generated out-of-state and deposited at Oregon landfills. The amount of the surcharge must be based on the actual costs to the State and its political subdivisions of disposing of the out-of-state waste. Consistent with its statutory charge, the EQC promulgated rules setting the per-ton surcharge at $2.25. Or. Admin. R. 340-61-120(6).

To challenge the surcharge on out-of-state generated waste, petitioners availed themselves of an expedited and limited form of administrative rule review available under the Oregon Administrative Procedures Act (Or. Rev. Stat. ch. 183). Oregon permits

challenges to administrative rules through original "rule review" actions in the Oregon Court of Appeals. Or. Rev. Stat. § 183.400. Significantly, under Oregon's special statutory procedure, "any person"[3] may challenge the validity of an administrative rule. Or. Rev. Stat. § 183.400(1). One who wishes to challenge a rule through this vehicle need not suffer any injury or have any direct stake in the rule and its validity. The scope of the court's review is narrow. Judicial review is limited to an examination of: (1) the challenged rule; (2) the statutory provisions authorizing the rule; and (3) the documents showing compliance with applicable rule-making procedures. Or. Rev. Stat. § 183.400(3). With only one exception not applicable here, there is no mechanism for adjudicating factual issues or disputes.[4] Thus, judicial review of a rule pursuant to this special administrative procedure is narrowly circumscribed: it is "limited to the face of the rule and the law pertinent to it. Numerous individual fact situations can arise under any rule, but judicial review of the rule as applied to each of those situations is reserved to other forums." *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or. 74, 79, 843 P.2d 409 (1992); *accord Gilliam County, supra*, 316 Or. at 113. The only relief the appellate court may grant is a declaration that the rule violates state or federal constitutional provisions, the rule exceeds the agency's statutory authority, or the agency adopted the rule without proper compliance with rule-making procedures. Or. Rev. Stat. § 183.400(4).

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[3]"Person" is defined broadly to include any individual, partnership, corporation, governmental subdivision or public or private organization of any character, other than an agency. Or. Rev. Stat. § 183.310(7).

[4]The Oregon Court of Appeals has authority to appoint a special master for the limited purpose of resolving disputed allegations concerning irregularities in the procedure relating to a rule's adoption. Or. Rev. Stat. § 183.400(5). That is the sole circumstance in which the appellate court may take evidence and make findings of fact.

In electing to proceed under this statute, petitioners chose the most limited possible judicial forum for their challenge, one which produced the most limited possible record. They declined to pursue any of the available state or federal court remedies that would have permitted a full examination of the fees and costs assessed on in-state as well as out-of-state waste. They thus avoided any inquiry into the relative economic burdens on in-state and out-of-state waste, and they escaped any realistic assessment of whether the challenged fee in fact has an anti-competitive effect. Additionally, petitioners used the one forum or form of action that did not require them to assert some real stake in the outcome of the challenge, an inquiry that would have revealed actual injury if any has occurred and might have demonstrated a real and substantial discriminatory burden on interstate commerce, if any exists.[5]

A. *Review would be hampered by uncertainty whether petitioners have standing to raise their claim in federal court.*

Petitioners' standing to press their claims in federal court is at best uncertain, for they were not required in state court to show any actual injury and the record in fact reflects none. Nor is there any

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[5]Petitioners by-passed the opportunity to challenge the fee in federal district court, state trial court and other state forums which could have produced a factual record on standing, the economic burdens on in-state waste and injury to petitioners' interests. For example, petitioners could have brought an action in either state or federal court under 42 U.S.C. § 1983. Also, because petitioners could have challenged the validity of the authorizing statute on the same theory that they attacked the implementing rule, they could have brought their challenge in the state trial courts. *See generally Hay v. Dept. of Transportation*, 301 Or. 129, 719 P.2d 860 (1986). Petitioners also had available to them administrative remedies in which their challenge could have been adjudicated in the context of a more fully developed record. *E.g.*, Or. Rev. Stat. § 183.410 (declaratory procedure in which agency may determine the applicability of its own rules to any person, property or state of facts); Or. Rev. Stat. §§ 183.415 and 183.450 (full adjudicatory hearing procedures available when agency enforcement of a rule or statute gives rise to an actual controversy between the agency and a person).

reason why standing would be presumed. Petitioners must, however, be able to demonstrate that they have suffered or are threatened with injury by the operation of the rule they challenge to have standing to challenge the fee in the federal courts. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1667 (1991); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Petitioners are distinct entities with distinct interests. Petitioner Oregon Waste Systems, Inc. (OWS) owns and operates an in-state regional solid waste disposal facility known as the Columbia Ridge Recycling Center and Landfill. Petitioner Gilliam County is a political subdivision of the State of Oregon, and the county in which OWS's landfill is located. Petitioner Columbia Resource Company (CRC) has a 20-year contract with a county in the State of Washington, under which it disposes of solid waste originating in that out-of-state jurisdiction. CRC uses the Finley Buttes Landfill in yet another Oregon jurisdiction (Morrow County) as its disposal site. *Gilliam County, supra,* 316 Or. at 103, n. 1 (quoting description of petitioners' "interests" from Court of Appeals' opinion). In short, the record shows only that petitioners are: (1) an in-state landfill that is obligated to collect the surcharge on waste generated out-of-state; (2) the Oregon county in which the landfill is located; (3) a corporation that has a long-term contract to dispose of out-of-state waste and that uses a landfill located in another Oregon county for that purpose.

Beyond establishing those few facts, the record is silent. The in-state landfill (OWS) has neither alleged nor shown a loss of business from the surcharge on out-of-state waste. No loss is inevitable, for there is nothing in the record to reveal the cost of dumping solid waste in landfills in nearby states. As a consequence, there is nothing to suggest that the fee renders the in-state landfill less competitive than landfills in other states or that any solid waste has been or is likely to be diverted to out-of-state competitors. For

the same reason, there is no suggested or likely injury to petitioner Gilliam County, whose interest in the litigation appears to derive primarily from the in-county jobs the landfill generates.[6] Moreover, to the degree petitioners contend that Oregon residents realize an advantage because they do not pay the same surcharge for the disposal of in-state waste, the argument suggests that the in-state landfill and the county may be benefited rather than hurt by the fee structure because Oregonians will have an incentive to dispose of all of their waste in-state rather than to send it to out-of-state landfills. That claim, if true, perhaps could be presented by a competing out-of-state landfill, but it is difficult to see how it can be presented by any party now before the Court.

The record is equally bereft of any claim or showing that CRC, the company engaged in transporting out-of-state waste to an Oregon landfill, has suffered or inevitably will suffer any injury. Nothing suggests that CRC pays the surcharge for out-of-state waste directly, as opposed to passing the cost on to its customers. Nor has there been any allegation of lost profits or business of any kind. Rather, in its petition, CRC posits speculative injuries to hypothetical third persons, an effort apparently designed to demonstrate to the Court that Oregon's surcharge on out-of-state waste must work an injury to someone's commercial interstate interests somewhere. CRC Pet. Cert. pp. 23–26. The very resort to such hypotheticals, however, suggests that CRC itself suffers no injury or loss as a result of the Oregon fee. Indeed, CRC's arguments tend if anything to refute that suggestion. By pointing to the presumed burden on

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[6]Petitioner Gilliam County's asserted interest in this litigation is that the landfill located within its boundaries provides direct and indirect benefits to the county as a result of employment in the county and the payment of local fees and taxes. OWS Pet. Cert. 7. Significantly, however, there is no allegation that those interests have been in any way harmed by the surcharge in question, nor did there need to be for purposes of Gilliam County's ability to be a named party to the state administrative rule review procedure.

Washington residents who produce and must dispose of their own solid waste, CRC suggests that it does not pay the added surcharge, but instead that the surcharge is passed on to others. In any event, the existence of such injured third parties is pure conjecture in this case. "Unadorned speculation" is not a sufficient basis to invoke federal judicial power. *Diamond v. Charles*, 476 U.S. 54, 66 (1986). Nor is there any reason to permit this petitioner to assert the interests of others who appear to be fully capable of doing so themselves. *Id.*, at 65–66 (litigant may not assert the rights of presumably competent third parties).

This court's review of the question petitioners seek to present thus would be plagued by questions of standing that have never been addressed or answered in this litigation, because they did not have to be for purposes of the state court's review. On the basis of the limited record before the Court, petitioners' standing is both uncertain and difficult to resolve.

B. *The Oregon Supreme Court's narrow holding is unremarkable given the limited context of the challenge.*

The lack of a record on standing points to an equally troubling void: there has been no showing (and no effort to show) any actual impact on interstate commerce. On the basis of this record, the effects of the Oregon surcharge on interstate commerce are both unknown and unknowable. The Court has stressed that the "critical consideration" in Commerce Clause cases is the actual effect of the challenged enactment. *Brown-Forman Distillers v. New York Liquor Authority*, 476 U.S. 573, 579 (1986). In this case, the Court would be left to determine the "practical operations" of Oregon's rule in a vacuum, *see Maryland v. Louisiana*, 451 U.S. 725, 755 (1981), or to leave a more complete resolution of the challenge to another day.

The Oregon Supreme Court's holding is narrow and limited, notwithstanding petitioners' attempts to make it appear broad-

reaching. The state court had before it only the specific administrative rule setting the amount of the surcharge and the authorizing statute. The record and scope of the proceeding did not permit a meaningful examination of the fees, assessments, taxes or other burdens on in-state waste producers. That void was pointed out most sharply by the Oregon Court of Appeals (the level at which the review originated), where the court observed that it was impossible to compare the costs to in-state and out-of-state waste producers because of the limitations of the procedure petitioners chose for their challenge. *Gilliam County v. Dept. of Environmental Quality*, 114 Or. App. 369, 387, 837 P.2d 965 (1992).[7] The Oregon Supreme Court similarly was constrained by the narrow scope of the proceeding and the limitations of the record before it. *Gilliam County*, *supra*, 316 Or. at 112–13.

Thus, nothing before the state courts established the relative burdens on in-state and out-of-state commercial interests. The proceeding was devoid of anything that would permit the court to assess whether the surcharge on out-of-state waste results in an economic disadvantage for out-of-state waste producers.[8] Of course, had the proceeding been one in which a party challenging

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[7]The Court of Appeals observed:

> We cannot discern, from a facial review of the rules and legislation whether, in the aggregate, in-state garbage ultimately "pays" all of the costs that the state and its political subdivisions incur to manage and regulate its disposal. However, it does show that EQC is expressly forbidden to impose fees on out-of-state waste that exceed the costs of management of that waste. The legislature has made it abundantly clear that it intends only to make "out-of-state generators pay their 'fair share' of the costs" and no more. *Chemical Waste Management v. Hunt*, *supra*, ___ US at ___ n 9.

Id., 114 Or. App. at 387.

[8]An uncharitable observer might conclude that petitioners chose the most limited possible forum available in an effort to be spared the necessity of attempting to demonstrate that the rule has any anti-competitive effects.

the fee had to demonstrate some actual injury, that threshold question might have been answered from the outset.[9] Instead, because of the limitations of the procedure pursued by petitioners to invalidate the fee, the Oregon courts were confronted with a particularly abstract question: does the Oregon fee on out-of-state waste necessarily and inherently discriminate against that out-of-state waste? Put another way, is the fee unconstitutional under any and all conceivable circumstances? Petitioners argued that the fee is *per se* invalid, because it applies only to out-of-state waste and it thus is based only on point of origin. In rejecting that argument, the Oregon Supreme Court did not purport to hold that the surcharge on waste generated out-of-state is valid under any set of circumstances. It merely held that the fee, on its face, is not unconstitutional given that it is directly tied to the costs of disposing of out-of-state waste and there is a "discernable basis for the charge apart from its origin." *Gilliam County*, *supra*, 316 Or. 112. That much seems unremarkable. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978). The state court expressly held open the other questions raised by petitioners, such as whether the fee is an accurate reflection of those costs or whether it is in some other way excessive.

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[9]That is especially true if standing requires not merely a showing of injury, but instead a showing of injury stemming from the allegedly discriminatory effect of the state surcharge. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986)(to claim an antitrust violation, plaintiffs must prove more than injury; they must prove injury that flows from the anti-competitive effects of the alleged violation); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977)(same). Here, for example, petitioners assert that Oregon should be obligated to apply the surcharge to both in-state and out-of-state waste, or not at all. Assuming Oregon were to apply the surcharge to in-state and out-of-state waste alike, the costs to CRC of bringing in solid waste generated in the State of Washington would remain the same. The in-state landfill (OWS) and the county in which it is located might suffer greater injury because in-state waste might be diverted to out-of-state landfills. Petitioners' injuries, if any, therefore appear to be a consequence of any surcharge assessed on the disposal of out-of-state waste, irrespective of whether it is also assessed on in-state waste.

C. *The question presented does not merit the Court's attention at this juncture.*

Contrary to the assertions in both petitions, the decision in this case is not squarely in conflict with the Seventh Circuit's decision in *Government Suppliers Consolidating Serv. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992) *cert. denied* 113 S. Ct. 977 (1993). The challenged disposal fee in that case and this one are similar in that they both involved surcharges on the disposal of out-of-state waste based on the costs incurred. The plaintiffs in the *Bayh* case, however, had demonstrated that the Indiana regulations on solid waste disposal (which included the challenged fee) had increased costs, diminished revenues and profits, and had caused out-of-state waste to flow to sites in other States. *Id.*, 975 F.2d at 1273–75. Moreover, the trial court concluded factually that the challenged Indiana provisions would eliminate the interstate transportation of solid waste to the State of Indiana. *Id.*, 975 F.2d at 1273. No facts of a similar nature were before the Oregon courts and the Oregon Supreme Court did not purport to declare how it would resolve the challenge in the face of similar evidence.

Nor does the Oregon Supreme Court's holding mark a renegade disregard of the Court's precedent in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992), as petitioners OWS and Gilliam County attempt to suggest. They assert that Oregon's fee is "indistinguishable" from the fee challenged in *Chemical Waste* and that the Oregon Supreme Court's holding is nothing short of "amazing." OWS Pet. Cert. 2. Somewhat more realistically, petitioner CRC at least concedes that *Chemical Waste* involved "subtly different" facts, but asserts that the decision nevertheless should be directly controlling. CRC Pet. Cert. 8.

In fact, however, both the fee in question and the record before the Court in *Chemical Waste* were significantly different. The Alabama fee on out-of-state hazardous waste had no relationship to costs incurred by the deposit of out-of-state waste at local treatment

facilities. To the contrary, the trial court expressly concluded as a factual matter that the only basis for the additional fee on the out-of-state waste was its origin. *Id.*, 112 S. Ct. at 2014–15. The Oregon Supreme Court correctly recognized this key distinction. *Gilliam County, supra*, 316 Or. at 112. Moreover, *Chemical Waste*, like the Seventh Circuit's decision in *Bayh*, was decided on the basis of a fully developed record which permitted an examination of the actual effects of the Alabama fee. As this Court observed, the record established that the fee had plainly discouraged the full operation of the Alabama treatment facility that brought the lawsuit, and the volume of hazardous waste brought to the facility in fact had fallen "dramatically" to less than half of the volume it treated before the fee went into effect. *Id.*, 112 S. Ct. at 2014 and n. 4.

With the case in its current posture, therefore, the Court would be forced to one of two resolutions, neither of which is satisfactory. On the one hand, the Court could agree with petitioners that Oregon's fee is unconstitutional under any set of facts or circumstances, despite the fact that it is directly related to the costs that the state and its political subdivisions incur due to disposal of out-of-state waste in local landfills. Alternatively, the Court could conclude that the out-of-state fee is facially valid because of its nexus to actual costs, but that it nevertheless may be unconstitutional if it is excessive, disproportionate or has an anti-competitive or protectionist effect. That holding would leave for another day the ultimate resolution of petitioners' challenge, just as the Oregon courts were forced by petitioners' choice of procedure to leave such challenges to other lawsuits. The record in this case provides no basis to determine whether that the surcharge exceeds or is in some other way disproportionate to the costs incurred by the State in disposing of waste from out-of-state producers. Similarly, the record is inadequate to resolve any claim that the fee has an

economic protectionist effect, which is a never-before-advanced argument that CRC improperly injects into its petition for certiorari for the first time in this case.[10] To grant certiorari to render such a limited and abstract rule that will not fully resolve any challenge, including the challenge to Oregon's fee, would hardly be a worthwhile expenditure of the Court's resources.

D. *The issue presented, if it has the importance petitioners believe it has, will be better resolved on other records.*

Rather than determine the validity of Oregon's fee on the basis of the limited record and procedure before the Court, the Court should allow the issues to be sharpened and clarified, or fully resolved, by further consideration in lower courts. If, as petitioners claim, the Oregon court's decision necessarily presages a host of similar enactments, there will be no shortage of opportunities for the Court to attempt to refine the line between special fees attached to out-of-state articles of commerce based on legitimate distinctions and those that are based on patent discrimination against interstate trade. *See Chemical Waste Management v. Hunt, supra*, 113 S. Ct. at n. 5. The Court can better enter that arena and decide the "close cases," (*id.*, at n. 5 and n. 9), where the inquiry is not purely abstract, but is based on a fully developed record.

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[10]CRC argues that the fee is protectionist in several ways. It implies in its second question presented and in its statement of the case that the fee was specifically designed to reduce the flow of out-of-state waste into Oregon. CRC Pet. Cert. i, 2–3. It also argues that the fee shifts the economic burden of financing Oregon's solid waste program to interstate commerce. CRC Pet. Cert. 15. Finally, CRC's speculation about the fee's effects on various hypothetical businesses and out-of-state consumers of Oregon's landfill capacity represent protectionist-type claims. CRC Pet. Cert. 23–26. None of those arguments was made to the Oregon courts. To the contrary, the state expressly pointed out that "[petitioners] do not claim that the surcharge is protectionist in purpose or effect." Response to Allowance of Supreme Court Review at 4. That assertion was never disputed in the state courts. At most, petitioners sought to downplay the importance of protectionism in the Court's Commerce Clause jurisprudence. *See, e.g.*, OWS Pet. for Or. Sup. Ct. Review, 11–12, n. 3.

Indeed, that opportunity may arise soon enough in the context of the very fee petitioners challenge in this case. Petitioners have brought other lawsuits in state and federal court to test Oregon's surcharge on out-of-state solid waste.[11] Their complaints allege, in virtually identical language, the precise claim they ask the Court to review here: that by enacting and attempting to enforce the fee at issue in this case, Oregon discriminates against out-of-state generated waste, in violation of the Commerce Clause. Those cases will permit development of the record in a way that was necessarily precluded by the procedural limitations of the statutory procedure petitioners pursued here. Specifically, those lawsuits will permit: a determination whether the parties seeking to challenge the fee have an actual interest in the outcome of the lawsuit; a full examination of Oregon's regulation of both in-state and out-of-state solid waste; a comparison of the actual economic burdens placed on in-state and out-of-state waste producers; and an assessment of whether interstate commerce is in fact economically disadvantaged by the fee.

Oregon, perhaps together with other States, has an interest in a correct resolution of the basic question that underlies petitioners' challenge: under what circumstances and in what ways may a State attempt to recoup the costs it incurs by the disposal of out-of-state

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[11] *Oregon Waste Systems, Inc. v. Fred Hansen, in his Capacity as Director of the Oregon Dept. of Environmental Quality; State of Oregon Dept. of Environmental Quality; State of Oregon Environmental Quality Commission*, No. 93-804-FR (D. Or., filed July 2, 1993); *Columbia Resources Company v. Fred Hansen in his Capacity as Director of the Oregon Dept. of Environmental Quality; State of Oregon Dept. of Environmental Quality*, No. 93-768-JU (D. Or., filed June 25, 1993). *Morrow County, Inc. et al. and Oregon Waste Systems, Inc. v. Fred Hansen, in his Capacity as Director of the Oregon Dept. of Environmental Quality, et al.*, Case No. 91-CF-21 (Morrow County Circuit Court, filed March 7, 1991). Petitioners apparently do not believe that the decision of the Oregon Supreme Court in this case precludes presenting any aspect of their Commerce Clause claim to the federal court, a question that will have to be decided by the trial courts in these cases.

waste in local landfills? The problem here is that the Court would be forced to answer that question in a setting divorced from meaningful context. Oregon's justification for and interest in the fee cannot be satisfactorily explored, nor can the relative burdens on in-state and out-of-state commerce be accurately gauged. The sterile setting of this case would do little to advance a sound resolution of the constitutional principle at work. The Court should decline to review the question presented until it arises in a concrete setting and in the context of a fully developed record where the interests that hang in the balance are better articulated and defined. *Cf. Renne v. Geary*, 111 S.Ct. 2331, 2340 (1991) (Court would decline to decide issues of fundamental and far-reaching importance where the available record was amorphous and ill-defined).

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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OREGON WASTE SYSTEMS, INC., AND GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON, RESPONDENTS

On Petition For A Writ Of Certiorari To The Supreme Court Of The State of Oregon

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REPLY BRIEF FOR PETITIONERS

The Oregon Supreme Court upheld the facially discriminatory fee at issue in this case on purely legal grounds: it determined that state user fees are valid under the Commerce Clause as long as the amount of the fee is not "manifestly disproportionate" to the State's costs. Under the Oregon court's view, even if the fee discriminates on its face against interstate commerce there is no need to determine whether the State has a legitimate reason for imposing a disproportionate financial burden on interstate commerce, because the fee would be valid under the Commerce Clause even if the State has no justification for the discriminatory exaction.

Oregon does not even attempt to mount a defense of the merits of that legal determination; the brief in opposition does not contain *any* response to our arguments (Pet. 12-20) that the decision below is directly contrary to this Court's precedents, which forbid any sort of discriminatory state exaction. And Oregon does not dispute our submission that the correctness of the state court's special legal standard for user fees is a significant question warranting this Court's attention. Indeed, Oregon expressly concedes that the legal question is "important" (Opp. 3).

Apparently unable to justify the legal rule adopted by the state supreme court, Oregon instead devotes its entire brief in opposition to obfuscation, creating a series of procedural arguments designed to convince this Court that the legal question is not properly presented in this case. In making these arguments, Oregon is walking a procedural tightrope. To defeat certiorari, the State must create the impression that there was some procedural deficiency in the decision below -- the parties challenging the discriminatory fee lacked standing or the lower court's ruling was dictated by the narrow scope of review or the lack of a factual record. But if the State were to commit forthrightly to any of those positions, it would undermine the State's attempt to foreclose relitigation on the ground that the decision below inclusively

determined the matter. Thus, Oregon has phrased its arguments very carefully -- for example, petitioners did not lack standing to challenge the discriminatory fee, but their standing is "uncertain" because "the record" does not reflect their injury (Opp. 5).[1]

This Court should not allow Oregon to execute a judicial "squeeze play," defeating certiorari by creating the impression that the Oregon Supreme Court's decision suffers from procedural defects and then preventing relitigation of the Commerce Clause discrimination claim on the ground that it was conclusively resolved by the Oregon Supreme Court. There is no substance to Oregon's procedural smokescreen. The Oregon Supreme Court squarely decided an important question of federal law as to which the lower courts are in conflict. The correctness of that ruling is cleanly presented in this case. The petition for a writ of certiorari should therefore be granted.

A. Petitioners Plainly Have Standing To Challenge The Discriminatory Fee.

Oregon first asserts (Opp. 5) that the Court should deny review because petitioners' standing to press their Commerce Clause claim is "uncertain." That contention is preposterous on its face. Petitioner Oregon Waste Systems ("OWS") is challenging the constitutionality of a tax *that it is obligated to pay* under Oregon law. See Or. Rev. Stat. § 459.297 (1991). Paying the tax will, of course, leave "petitioner poorer in an absolute sense than before." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 48 (1990). That direct financial burden -- which is clear from OWS's status as the operator of a waste disposal facility (as alleged in the petition for review) and from the express requirements of the statute -- plainly is sufficient to satisfy federal standing requirements.

Oregon's apparent contention (Opp. 6) that OWS must also demonstrate harm to its business seems to stem from the State's belief that OWS might be able to avoid injury by passing on the unconstitutional tax to its customers. The State thus asserts that petitioners "were not required in state court to show any actual injury and the record in fact reflects none." Op. 5.[2] It rests this contention on the proposition that "there is nothing to suggest that the [discriminatory] fee renders the in-state landfill less competitive than landfills in other states or that any solid waste has been or is likely to be diverted to out-of-state competitors." *Id.* at 6. But the State's contention is the one that has no support in the record: the State cannot argue away the direct financial injury to OWS caused by a law obligating the company to pay money to the State. That clear burden on OWS could possibly be overcome only by a factual showing that OWS in fact would bear no increased costs -- and would not suffer decreased

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[1] Indeed, Oregon very carefully avoids casting doubt on the preclusive effect of the decision below, asserting only that "*[p]etitioners* apparently do not believe" that the decision below precludes relitigation of the Commerce Clause claim (Opp. 14 n.11) (emphasis added), but saying nothing at all about the State's position regarding that issue. By expressly acknowledging that petitioners may still claim that the fee is excessive (Opp. 10), but saying nothing about petitioners' claim that the fee discriminates against interstate commerce, the State provides an indication of the position it plans to take in subsequent proceedings.

[2] Oregon law in fact requires a demonstration of likely injury. See, *e.g.*, *Gruber* v. *Lincoln Hosp. Dist.*, 588 P.2d 1281, 1284 (Or. 1979) ("a taxpayer's standing as such to demand equitable relief in his own name in Oregon has depended on allegations that the challenged governmental action had actual or potential adverse fiscal consequences"); *Hanson* v. *Mosser*, 427 P.2d 97, 101-102 (Or. 1967).

revenues -- as a result of the tax. There is no such evidence here.[3]

And it is inconceivable that the State could make such a showing. As this Court has explained, a tax that violates the Commerce Clause by discriminating against out-of-state taxpayers

> place[s] [such a taxpayer] at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products. * * * To whatever extent [the out-of-state taxpayer] succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to favored distributors or else incurred other costs (*e.g.*, for advertising) in an effort to maintain its market share.

McKesson, 496 U.S. at 48 (footnote omitted).

Finally, the State's argument is also beside the point. A taxpayer's ability to mitigate the effects of a discriminatory tax by passing the burden on to someone else does not deprive the taxpayer of standing to challenge the constitutionality of a levy that it is obligated to pay. See generally *McKesson*, 496 U.S. at 46-48 (holding that the

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[3] The rulemaking record indicates that the State could not make such a showing. Indeed, the Department of Environmental Quality (DEQ) found that landfill operators like OWS *would* lose business as a result of the discriminatory fee. In promulgating the regulation containing the fee, DEQ opined that "it is difficult to quantify what the resulting decrease in disposal volumes [of out-of-state] waste might be," but went on to hypothesize that a $1.50 per ton surcharge would decrease volume at a typical landfill by 36,000 tons, "resulting in a revenue loss of $900,000 (@ $25/ton) to the landfill operator." *Rulemaking Statements for Proposed Revisions to Existing Rules Pertaining to a Surcharge on Out-of-State Solid Waste*, *reprinted in* OWS Ct. App. Pet. for Review at A-17.

possibility of such a pass-through does not vitiate a state's obligation to refund a tax "that is unconstitutional because it is discriminatory"). The direct financial burden imposed on OWS by the discriminatory tax plainly is sufficient to satisfy the standing requirement of Article III.

B. The Oregon Courts' Scope Of Review Had No Effect Whatever On Their Disposition Of the Discrimination Claim.

Oregon's principal argument is that the procedure expressly provided under Oregon law for reviewing the constitutionality of the discriminatory fee somehow skewed the lower courts' disposition of this case. The State intimates that the judgment below is a product of the limits on those courts' authority. The Oregon Supreme Court's opinion itself demonstrates that simply is not true.[4]

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[4] The State repeatedly intimates (Opp. 3, 5, 9 n.8) that petitioners chose the expedited review procedure available under Oregon law in order to gain some unfair advantage. There is no basis to that claim. Oregon law precluded petitioners from challenging the rule directly in a state trial court. See Or. Rev. Stat. § 183.400(2) (1991); *Hay* v. *Department of Transportation*, 719 P.2d 860 (1986). Petitioner OWS, for example, would have had to refuse to pay the tax and then either seek review of the assessment or await an enforcement action. See Or. Rev. Stat. §§ 183.415 & 459.376. In either case, OWS could have been liable for civil and criminal penalties, including suspension or revocation of its disposal facility permits. *Id.* §§ 459.992-459.995; Or. Admin. R. 340-14-045. OWS preferred to utilize a review procedure that would not threaten such onerous consequences.

Two other routes were not certain to yield a decision. Although the state Environmental Quality Commission may issue declaratory rulings (Or. Rev. Stat. § 183.410), it has absolute discretion to decide whether to entertain such a proceeding. That body -- which promulgated the rule at issue -- had considered and rejected Commerce Clause challenges during the rulemaking

The Oregon Supreme Court considered two bases under which the discriminatory fee may be invalid under the Commerce Clause. First, whether it discriminated against interstate commerce without justification "'both in terms of the local benefits flowing from the [fee] and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2014 (1992) (citation omitted). Second, whether the amount of the fee was manifestly disproportionate to the services rendered by the State.

The state supreme court declined to address the second issue, stating that "[s]uch a claim cannot be adjudicated in the present proceeding. *Our scope of review under ORS 183.400 precludes us from deciding* whether the surcharge is impermissible as 'disproportionate' to the services rendered or to the costs incurred by the State of Oregon in connection with permitting waste disposal sites to accept solid waste generated out of state, because those are factual inquiries." Pet. App. 18a-19a (emphasis added).

The Oregon court did not disclaim its ability to decide the discrimination claim. It instead squarely and unequivocally rejected petitioners' contention that the fee discriminates against interstate commerce in violation of the

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process and therefore appeared most unlikely to entertain a constitutional challenge to the rule's validity. An action in federal district court would not have allowed petitioners to raise their state-law challenges to the fee (see Pet. App. 6a-7a) because of the restrictions imposed by the Eleventh Amendment and such an action almost certainly would have become enmeshed in the complexities of the Tax Injunction Act's limits on the power of the federal courts to grant relief in cases challenging state taxes (see 28 U.S.C. § 1341). All in all, the expedited review process appeared to petitioners to be the most appropriate approach. If the state courts could not address some issue because of limits on their jurisdiction, the issue then could be pursued in another forum.

Commerce Clause. *And it did so for a reason not tied to the particular facts of this case*. The court determined that the applicable legal standard precluded the discrimination claim:

> A law imposing a compensatory fee for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce is *prima facie* reasonable. Such a law violates the Commerce Clause only where the amount of the fee is "manifestly disproportionate to the services rendered."

Pet. App. 18a (citations omitted). Thus, the Oregon Supreme Court rested its rejection of the discrimination claim entirely on legal grounds not linked in any way to the Oregon courts' limited review of factual questions. The question presented in the certiorari petition is whether that legal ruling is correct. Because the Oregon Supreme Court's own opinion demonstrates beyond doubt that the court did not believe itself limited by the scope of review in deciding the discrimination claim, there is no reason this Court should be.

C. The Absence Of A Factual Record Was Irrelevant To The Decisions Below And Is Irrelevant To The Question Presented In The Certiorari Petition.

Oregon also asserts (Opp. 8) that the Court should not grant review because there is no factual record establishing the actual effect of the discriminatory fee on interstate commerce. Again, however, the legal principle adopted by the Oregon Supreme Court -- and challenged in the certiorari petition -- has nothing to do with the particular discriminatory impact of this or any other user fee. That court's rule is a blanket exemption from ordinary Commerce Clause discrimination analysis for *all* user fees. The correctness of that rule is a legal question that does not depend on any particular set of facts.

And, contrary to Oregon's claim (Opp. 11), the conflict between the Oregon court's view of that question and the determination by the Seventh Circuit in *Government Suppliers Consolidating Service* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 113 S. Ct. 977 (1993), has nothing whatever to do with the alleged existence of a factual record in the latter case. *Government Suppliers* was a facial challenge, just like this case, and there was no evidence regarding the impact of the discriminatory Indiana fee before the Seventh Circuit because *the fee had never gone into effect* (indeed, the amount of the fee had never even been set). 975 F.2d at 1271-1272, 1281-1282. Thus, Oregon's purported distinction between the present case and *Government Suppliers* is simply wrong; the two cases were in precisely the same procedural posture. The conflict is indisputable (a fact confirmed by Indiana's decision to file an amicus brief supporting certiorari here).

The facts that Oregon identifies, moreover -- such as "the effect[] of the Oregon surcharge on interstate commerce" (Opp. 8) -- do not relate to the legal standard adopted by the Oregon Supreme Court. The existence of a discriminatory burden on interstate commerce is irrelevant under that test. Rather, these facts would have become relevant only if the Oregon court had applied the correct legal standard, which requires an inquiry into whether the fee discriminates against interstate commerce and whether that discrimination is justified by some cost differential between in-state commerce and interstate commerce (see Pet. 12-20).

At that point, the Oregon court would have faced two choices. It could have concluded that a factual record was not necessary to hold the discriminatory fee unconstitutional under the Commerce Clause. Given the express imposition of a burden only on interstate commerce and the fact that the Oregon statute requires the fee to be set at a level that would recover all costs not covered by other disposal charges, not simply those costs unique to interstate waste (see Or. Rev. Stat. § 459.298 (1991)), the measure is clearly unconstitutional. See Pet. 18-20.[5] For example, the Seventh Circuit did not require any record regarding the actual effects of the fee in order to hold the Indiana fee unconstitutional on its face. And this Court has never indicated that evidence of the actual effect of a facially discriminatory law is necessary in order to hold it unconstitutional under the Commerce Clause.

Alternatively, the Oregon court could have concluded that factual development was needed, and declined to address the discrimination claim, just as it declined to address the excessiveness claim (see page 6, *supra*). What the state court could not do is what it did here: reject petitioners' discrimination claim on the basis of a patently incorrect legal ruling. This Court should correct that error.[6]

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[5] Oregon hints (Opp. 9) that the state courts could not even determine whether the fee discriminated against interstate commerce because they could not conduct a "meaningful" examination of the other fees and taxes on in-state waste generators. Because all of these measures are embodied in statutes and regulations, and the Oregon procedure plainly permits courts to examine other laws (see, *e.g.*, Pet. App. 10a, 12a-13a), it seems most unlikely that a court could not resolve that question, at least to the extent of determining whether any of these other measures satisfy this Court's test for "compensatory taxes" that may eliminate the discriminatory effect of measures targeting only interstate commerce. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 758-760 (1981). (The passage of the Oregon Court of Appeals decision quoted by the State (Opp. 9 n.7) does not discuss that inquiry, but rather appears to relate to the sort of agglomeration of tax burdens on in-state commerce that this Court specifically rejected as a matter of law in *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266, 287-289 (1987). Indeed, the Oregon Court of Appeals specifically indicated that its decision did *not* rest on the compensatory tax doctrine. Pet. App. 39a & n.18.) In any event, the Oregon Supreme Court did not rest its decision on the ground that the fee did not discriminate. It held that any discrimination was legally irrelevant. That is the legal question presented to this Court for review.

[6] Thus, this Court does not face the choice posed by Oregon (Opp. 12-13) between holding the discriminatory fee

* * * * *

Finally, Oregon includes in its roundup of procedural arguments the routine assertion (Opp. 13-15) that the petition should be denied because other cases will better present the issue raised here, including other lawsuits filed by petitioners. That contention is quite disingenuous. As we have discussed (see page 2 & n.1), Oregon undoubtedly will invoke the decision below to attempt to *preclude* any further litigation regarding the claim that the fee discriminates against interstate commerce in violation of the Commerce Clause. If this Court were to deny certiorari, petitioners may not have another opportunity to obtain review of that question.

To the extent Oregon means to refer to other parties challenging this or similar discriminatory fees, there simply is no reason for this Court to wait. As the amicus briefs point out, the legal rule adopted by the Oregon Supreme Court has the potential to create a great deal of uncertainty and confusion with respect to the Commerce Clause standards governing *all* user fees. That is especially true given the square conflict with the Seventh Circuit decision. State legislatures and businesses need guidance now regarding the governing legal rule. And the correctness of the Oregon court's approach is squarely presented in the case before the Court. The Court should act now to resolve this important legal question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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unconstitutional in all circumstances or holding the fee valid. The Court could address the important question of law -- whether user fees must pass muster under the anti-discrimination standard applicable to other state exactions -- and either apply the discrimination test itself or, if it has questions about the state of the record, remand to the Oregon courts for application of that test (or a decision that the issue cannot be resolved in this proceeding).

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AUGUST 1993

No. 93-70

In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF FOR THE STATE OF INDIANA AS AMICUS CURIAE SUPPORTING CERTIORARI

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QUESTION PRESENTED

Whether a state may impose fees designed to offset the additional costs incurred by it due to the importation of solid waste from other states, to avoid subsidizing the disposal of such waste, without violating the Commerce Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-70

OREGON WASTE SYSTEMS, INC., AND
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v.

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COMMISSION OF THE STATE OF OREGON, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF FOR THE STATE OF INDIANA AS AMICUS CURIAE SUPPORTING CERTIORARI

INTEREST OF THE AMICUS CURIAE

The State of Indiana has a strong interest in the constitutional rules that govern the interstate transportation and disposal of municipal waste. Because of its location and relatively low disposal costs, large quantities of municipal waste are shipped to Indiana for disposal. See *Government Suppliers Consolidating Services v. Bayh*, No. IP91-899C (S.D. Ind. Feb. 5, 1992), *reprinted at* No. 92-821, Pet. App. 35, *rev'd*, 975 F.2d 1267 (7th Cir.

1992), *cert. denied*, 113 S. Ct. 977 (1993) (*"GSCS II"*).[1] As a consequence, the State has been the recipient of untold thousands of tons of waste that were generated in other States. Indiana accordingly has attempted to develop a constitutionally acceptable means of ensuring that the costs associated with regulating the safe disposal of this waste are borne in a fair manner by those who create those costs.

The statute that Oregon enacted to address this problem, and that was upheld by the Oregon Supreme Court in this case, is virtually identical to an Indiana law that was recently struck down by the Seventh Circuit in *GSCS II*. While Indiana is in complete agreement with Oregon on the merits of the issue presented here, Indiana has an important interest in having this Court grant review so that it may validate the constitutionality of Indiana's approach. More broadly, Indiana has an interest in having this Court clarify the rules governing the interstate transportation and disposal of waste in a manner that is sensitive to the problems of recipient States. Indiana therefore submits this brief pursuant to Rule 37.5 of the Rules of this Court to assist the Court in the resolution of this case.

STATEMENT

This case concerns the constitutionality of an Oregon tax that is designed to generate funds to pay for the safe disposal of solid waste. Under the system currently in force in Oregon, the State imposes a fee of $.85 per ton on both out-of-state and Oregon-generated waste that is disposed of in Oregon. Or. Rev. Stat. §§ 459A.110(5), 459A.110(6), 459A.115 (1991). In addition, Oregon imposes a surcharge "on solid waste generated out-of-

[1] The order of the district court in *GSCS II* is not reported; for the Court's convenience, we have cited to the copy of that order reprinted in the appendix to the certiorari petition filed in *GSCS II*.

state"; the surcharge is explicitly limited to "person[s] who dispose[] of solid waste generated out-of-state." Or. Rev. Stat. § 459.297 (1991). This fee must be set by the Oregon Environmental Quality Commission at a level that will pay for "the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state." Or. Rev. Stat. § 459.298 (1991). Such costs include those associated with permit issuance, management, monitoring, and closure activities at disposal sites accepting out-of-state wastes. See Pet. App. 17a.

Following an administrative hearing, the Commission established $2.25 per ton as the additional fee for waste generated out-of-state. Or. Admin. R. 340-97-120(7). An equivalent fee is not imposed on wastes generated in-state.[2]

A Commerce Clause challenge to this distinction in treatment between in-state and out-of-state waste was rejected by the state courts. The court of appeals explained that "[t]he legislature has made abundantly clear that it intends only to make 'out-of-state generators pay their "fair share" of the costs' and no more." Pet. App. 43a-44a. The Oregon Supreme Court agreed. After rejecting (in relevant part) a state law attack on the Oregon regime (*see id.* at 7a-15a), the court found that "[b]ecause of the express nexus to actual costs incurred, * * * the surcharge [on out-of-state waste] does not, on its face, constitute discrimination against an article of commerce, the origin of which is outside the state. There is a discernible basis for the surcharge apart from that origin." *Id.* at 17a. The court added that, "rather than being a constitutionally impermissible burden on out-of-state economic interests * * * the surcharge imposed on

[2] As petitioners explain (at Pet. 7 n.4), the $.85 per ton fee on out-of-state waste will become ineffective if the $2.25 per ton fee on the waste is upheld by the courts. Thus, the additional fee is only $1.40 per ton.

out-of-state waste by ORS 459.298 and its implementing regulations constitutes a 'compensatory' fee for specific costs incurred by the state in the regulation of that waste" and therefore "is *prima facie* reasonable." *Id.* at 18a.

REASONS FOR GRANTING THE WRIT

This case presents a question that is of great importance to Indiana and other States that are recipients of large volumes of out-of-state waste. Indiana, like Oregon, enacted a regulatory framework that would have required the generators of out-of-state waste to pay their fair share of the costs of regulating the safe disposal of that waste -- that is, pay for the added costs that are attributable to such waste that in-state generators pay for in the form of general taxation. In contrast to the decision below, however, the Seventh Circuit held Indiana's law unconstitutional. Because those decisions cannot be reconciled, and because the problems associated with the disposal of waste are of enormous practical significance, review of the decision below is warranted.

A. The Decision Below Conflicts with a Recent Decision of the Seventh Circuit

In 1991, the Indiana legislature enacted a set of laws intended to address the problems associated with the disposal of out-of-state waste and that, in relevant part, were identical to the Oregon statute at issue here. Like the Oregon statute, Indiana law imposed a base per ton disposal fee (in Indiana's case, $.50) that was levied on both in-state and out-of-state waste. *See* Ind. Code § 13-9.5-5-1(a)(1), (2)(A) (1991), *reprinted in GSCS II*, 975 F.2d at 1271 n.4. Like the Oregon statute, Indiana law authorized an additional fee on wastes that were generated out-of-state. *See* Ind. Code § 13-9.5-5-1(a)(2)(B). Like the Oregon statute, Indiana law directed an administrative agency to carefully calibrate the additional fee at an amount "necessary to offset the costs incurred by the state

or a county, municipality, or township that can be attributed to the importation of the solid waste into Indiana and the presence of the solid waste in Indiana." Ind. Code § 13-9.5-5-1(b)(2).[3]

Also like the Oregon statute, the Indiana law was justified on the ground that it "'offset[] what would otherwise be a subsidy for interstate commerce' and 'require[d] out-of-state haulers [of waste] to shoulder their fair share of in-state administrative costs.'" *GSCS II*, 975 F.2d at 1283 (citation omitted). This is, of course, precisely the rationale upon which the Oregon courts upheld the tax at issue here. The Indiana law was upheld by the district court in the *GSCS II* litigation on just that ground; the court found that "the statute does not set an arbitrarily high fee on out-of-state trash. On its face, the provision premises any additional charge to out-of-state haulers on the amount necessary to offset governmental costs attributed to the importation of such waste, and this is sufficient to give it facial validity." *GSCS II*, No. 92-821, Pet. App. 65.

The Seventh Circuit nevertheless reversed. It struck down the Indiana law for the reason advanced by petitioners here in their challenge to the Oregon statute: the Seventh Circuit held the Indiana law per se unconstitutional because it "impose[d] a tax on haulers of waste who cross the state line, while sparing haulers of waste who remain entirely within the state." 975 F.2d at 1284 (footnote omitted). The court of appeals thus held that States may raise funds to ensure the safe disposal of waste only by imposing identical taxes on in-state and out-of-state wastes, despite the fact that generators of in-state

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[3] The Indiana law was invalidated before the agency had an opportunity to set the fee. *See GSCS II*, 975 F.2d at 1271.

waste already pay for those additional governmental costs through general taxation.

The decision of the Oregon Supreme Court in the present case and the holding of the Seventh Circuit in *GSCS II* plainly are irreconcilable. It cannot be disputed that Indiana's law would be valid if evaluated under the standard adopted by the Oregon Supreme Court in this case. Indiana and the other States in the Seventh Circuit thus are governed by a different constitutional rule than the one now applicable in Oregon. This Court should grant review to resolve the conflict.

B. The Issue Here Is an Important and Recurring One

That there is a conflict between a state court of last resort and a federal court of appeals on a significant issue of constitutional law is enough to justify consideration of the case by this Court. It also bears emphasis, however, that questions relating to the interstate disposal of waste are of great practical importance and have generated continuing confusion in the lower courts.

The disposal of solid waste is an enormous national enterprise, and the rules governing its disposal are of corresponding significance. Each year, our nation generates some 180 million tons of municipal solid waste. *See Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 80 (1991) (statement of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response, Environmental Protection Agency) (*"House Hearings"*). Approximately 15 million of these tons move in interstate commerce. *See id.* at 81. Indeed, only one of

the 50 states is neither an importer nor an exporter of waste. *See id.* at 283-291 (statement of Allen Moore).[4]

Some of the reasons for this movement are manifest. Space limitations, high land prices, or unfavorable geological conditions make disposal of waste in some areas much more expensive than in others. Indiana's experience is illustrative. The cost of waste disposal in an Indiana landfill is approximately $15 per ton; by way of contrast, disposal of waste in some East Coast landfills may cost $125 per ton. Even taking into account transportation costs (approximately $35 per ton), it costs more than twice as much to dispose of East Coast waste at the point of generation than in Indiana. *See GSCS II*, No. 92-821, Pet. App. 43 (district court opinion). As a result, Indiana has received untold tons of other people's waste.

As might be imagined, this has imposed a significant burden on Indiana. There is reason to believe that out-of-state waste contains hazardous and other dangerous materials. *See Government Suppliers Consolidating Services v. Bayh*, 753 F. Supp. 739, 754-756 (S.D. Ind. 1990) (*"GSCS I"*). In addition, many waste disposal sites pose health risks and must be carefully monitored. *See id.* at 748. As matters now stand, the cost of regulation to guard against these dangers falls upon the people of Indiana, and out-of-state generators have a "free ride" because they are not required to pay for those costs attributable to their activities.

Attempts by the States and local governments to deal with these problems have led to continuing litigation, including two recent decisions of this Court and myriad

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[4] Of the 48 contiguous States, 38 both import and export waste. Five states and the District of Columbia are exporters only; four States are importers only. *See House Hearings* 283-291 (statement of Allen Moore).

decisions of federal and state courts across the nation. *See Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992). *See also, e.g., National Solid Wastes Management Ass'n v. Voinovich*, 959 F.2d 590 (6th Cir. 1992); *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 943 (11th Cir. 1991); *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987); *Browning-Ferris, Inc. v. Anne Arundel County*, 438 A.2d 269, 271-272 (Md. 1981); *Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders*, 495 A.2d 49 (N.J.), *cert. denied*, 474 U.S. 1008 (1985); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78 (N.Y. 1980). This problem will only grow worse as the volume of waste increases (annual production of municipal solid waste is projected to reach 216 million tons by the year 2000) and the capacity of existing landfills is exhausted (landfill disposals increased from 99.7 million tons in 1975 to 130.5 million tons in 1988). *See* United States Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update* 10, ES-3. *See also* 56 Fed. Reg. 50,980 (1991) (45% of solid waste landfills expected to reach capacity by 1991).

Indiana, like Oregon, believes that it had taken a reasonable and wholly constitutional approach that accommodated the competing interests by "levelling the playing field" to prevent an unfair subsidy to waste from other states. In contrast, the approach adopted by the Seventh Circuit and advocated by petitioners -- imposing an arbitrary uniform fee on out-of-state and in-state waste -- does not level the playing field; instead, it places a special burden on the citizens of recipient States. As Chief Justice Rehnquist has observed, a recipient State's

> general tax revenues presumably already support the State's various inspection and regulatory efforts designed to ensure [waste facilities'] safe operation. Thus, [recipient State residents] will be made to pay twice, once through general taxation and a second time through a specific disposal fee. Permitting differential taxation would, in part, do no more than recognize that, having been made to bear all the risks from such hazardous waste sites, [the recipient State] should not in addition be made to pay *more* than others in supporting activities that will help minimize the risk.

Chemical Waste Management, 112 S. Ct. at 2018-2019 (Rehnquist, C.J., dissenting) (emphasis in original). Whether the approach taken by Indiana and Oregon is permissible was left open in *Chemical Waste Management*. Alabama did not argue in this Court "that the additional fee makes out-of-state generators pay their 'fair share' of the costs of Alabama waste disposal facilities." 112 S. Ct. at 2016 n.9. Instead, as the Seventh Circuit noted, "the constitutionality of [the Alabama] fee hinged on the state's admitted purpose (to slow the volume of waste coming into its Emelle facility); * * * the Court did not consider the argument made here by Indiana" and Oregon. *GSCS II*, 975 F.2d at 1283 n.12.

Indiana firmly believes that compensatory fees may be imposed on the disposal of out-of-state waste. Therefore, this Court should grant the writ and uphold Oregon's law so that Indiana and the other States in the Seventh Circuit may use that approach.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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AUGUST 13, 1993

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BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-70

OREGON WASTE SYSTEMS, INC., AND GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF FOR THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE

National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 2700 member companies are engaged in the full spectrum of waste management services. NSWMA's members include collectors and transporters of solid and hazardous waste, operators of solid and hazardous waste treatment, storage, and disposal

facilities, waste recyclers, manufacturers and distributors of waste management equipment, and firms providing legal, financial, and consulting services to the waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.

NSWMA represents the interests of the waste management industry in judicial, legislative, and administrative forums. One threat to which the industry is perpetually subject is state and local efforts to prevent the interstate movement of waste for storage, treatment, disposal, or recycling. A popular means of accomplishing this purpose is to impose discriminatory taxes and fees on disposal of out-of-state waste. Because such measures necessarily obstruct the interstate movement of waste, NSWMA's members are directly and adversely affected by such provisions. They accordingly have a strong interest in presenting their views on the constitutionality of the waste disposal fee at issue in this case.[1]

ARGUMENT

THE CONSTITUTIONALITY OF DISCRIMINATORY DISPOSAL FEES IS AN ISSUE OF TREMENDOUS PRACTICAL IMPORTANCE TO THE WASTE INDUSTRY

Prior to the decision of the Oregon Supreme Court in this case, it was settled that the Commerce Clause prohibited the States from imposing waste disposal charges that varied with the waste's state of origin. Fees that imposed a greater burden on interstate commerce would be permissible only if the State could show that some difference in the composition of the out-of-state waste resulted in disposal-related costs

[1] Letters from the parties consenting to the filing of this brief have been submitted to the Clerk of this Court. See Rule 37.2.

higher than the costs associated with waste generated within the State. No State had ever carried that burden.

That was the rule applied by this Court a little more than one year ago in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992), and that was the rule applied by lower courts in the wake of *Chemical Waste Management*. *See Government Suppliers Consolidating Services v. Bayh*, 975 F.2d 1267, 1283-1284 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993); *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, 801 F. Supp. 725, 735 (M.D. Ga. 1992); see also *National Solid Wastes Management Ass'n v. Voinovich*, 959 F.2d 590 (6th Cir. 1992).

The Oregon Supreme Court reached a sharply different conclusion in this case. It severely limited the reach of this Court's decision in *Chemical Waste Management* by holding that fees tied to the value of services provided by a State or costs incurred by it are valid under the Commerce Clause even if such fees are imposed *solely* on interstate commerce. Thus, even if the costs incurred by the State for each ton of interstate waste are the same as those associated with a ton of in-state waste, the State may require interstate commerce to "pay its own way" while exempting intrastate commerce from the burden of compensating the State for the very same costs. In upholding the Oregon statute on that basis, the Oregon court adopted a legal rule that the Seventh Circuit had squarely rejected when that court invalidated on Commerce Clause grounds an Indiana statute virtually identical to the Oregon law. *See Government Suppliers Consolidating Services v. Bayh*, 975 F.2d at 1283-1284.

The certiorari petition sets out in detail (Pet. 12-20) the flaws in the Oregon Supreme Court's legal analysis. Our purpose in filing this amicus brief is to explain to the Court the importance of the issue to our industry. Interstate movements of waste are necessary to the safe and efficient disposal of waste, but political and economic pressures in

importing states combine to favor imposition of disproportionate financial burdens on waste generated outside the state. The Oregon decision rips a loophole in the well-settled Commerce Clause prohibition against such discriminatory measures. Indeed, the decision below threatens to recreate the very uncertainty over the constitutional principles governing state waste disposal fees that led this Court to grant review in *Chemical Waste Management*. The Court should act now to clarify the Commerce Clause standards applicable to state-imposed user fees.

A. Discriminatory Waste Disposal Fees Have Been A Particular Focus Of State Interest.

This country generates over 180 million tons of municipal solid waste and over 240 million tons of hazardous waste each year. *Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 4, 80 (1991) (statement of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response, Environmental Protection Agency) ("*House Hearings*").[2] While most of this waste is disposed of within the State of generation, a considerable portion -- approximately 15 million tons of municipal solid waste and 4 million tons of hazardous waste -- moves in interstate commerce. *House Hearings* at 81; NSWMA, *Interchange of Hazardous Waste Management Services Among States* 15 (Dec. 31, 1990) ("*Hazardous Waste Study*").

[2] Municipal solid waste is defined generally as "residential[] and commercial solid waste generated within a community." 40 C.F.R. § 241.101(k). Hazardous wastes are those solid wastes that may "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5)(B).

Moreover, the vast majority of States participate in this interstate market. A NSWMA study of municipal solid waste disposal found 133 different waste "interactions" among the lower 48 States and the District of Columbia, with each interaction reflecting a regular movement of waste between two jurisdictions. More than two-thirds of the States participate in this interstate market as both importer and exporter. *House Hearings* at 263, 290-291 (statement of Allen Moore, President, NSWMA). With respect to hazardous waste, all 50 States export some waste for treatment and disposal and 48 States import waste for those services; the average State sends waste to 19 other States for treatment and disposal. *Hazardous Waste Study* at 8, 10.

This interstate commerce exists because -- as is the case with other sectors of the economy -- only a mutually interdependent, nationwide system can provide the safest and most efficient waste disposal. Many of the Nation's population centers overlap two or three States. An out-of-state facility thus is often the closest and most cost-effective disposal option for many communities' municipal solid waste. Also, some communities may be too small to support a state-of-the-art disposal facility by themselves. Only by combining with other communities (both within and without the State) can they provide the volume needed to make a facility cost-justified. *House Hearings* at 258-259 (Moore).[3]

The same is true with respect to hazardous waste treatment and disposal. As the United States observed in its amicus brief in *Chemical Waste Management* (at page 8 (footnote omitted)),

[3] This is especially true given the strict federal regulations applicable to municipal landfills (*see* 40 C.F.R. Part 258), which are bound to increase significantly the cost of building and operating these facilities.

> [g]iven the nature of the hazardous waste management industry, * * * interstate transactions are inevitable. * * * Some wastes are generated in such small amounts that it is impractical to require a facility to treat or dispose of them in every State in which they are generated, or even in most States. In many cases, treatment or disposal facilities are so capital intensive that their economic viability depends upon the fact that there are only a few of them in the country.

Although well justified by considerations of safety and efficiency, these interstate movements of waste have proven to be a tempting target for discriminatory state taxation and regulation. As this Court has observed, the Commerce Clause ensures that "[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade." *Chemical Waste Management*, 112 S. Ct. at 2012 (footnote omitted). But, as this Court's docket alone illustrates, a number of States have tried in recent years to isolate themselves from the problem of disposing of our nation's waste. *See Chemical Waste Management*, *supra*; *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992); *C & A Carbone, Inc. v. Clarkstown*, cert. granted, No. 92-1402 (Feb. 24, 1993). The cases in the lower courts document a virtual epidemic of measures that discriminate against interstate commerce in waste.[4]

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[4] *See Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993); *In re Southeast Arkansas Landfill*, 981 F.2d 372 (8th Cir. 1992); *Government Suppliers Consolidating Services v. Bayh*, *supra*; *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991); *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993); *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, *supra*; *Northeast Sanitary Landfill, Inc. v. South Carolina Dep't of Health & Environmental Control*, No. 3-90-2296-17 (D.S.C. Jan. 3, 1992); *Medical Waste Assocs. Ltd. Partnership v. Mayor and Counsel of the City of Baltimore*, No. S 91-1547 (D. Md. Aug. 29, 1991); *Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991); *BFI Medical Waste Sys., Inc. v. Whatcom County*, 756 F. Supp. 480, 485 (W.D. Wash. 1991), *aff'd in part*, 977 F.2d 587 (9th Cir. 1992); *Government Suppliers Consolidating Services, Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990); *County of Washington v. Casella Waste Management, Inc.*, 1990 WL 208709 (N.D.N.Y. Dec. 5, 1990); *Browning-Ferris, Inc. v. Anne Arundel County*, 438 A.2d 269, 271-272 (Md. 1981); *Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders*, 495 A.2d 49 (N.J.), cert. denied, 474 U.S. 1008 (1985); *City of Elizabeth v. State of New Jersey Dep't of Environmental Protection*, 486 A.2d 356, 361 (N.J. Super. Ct. App. Div. 1984); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78 (N.Y. 1980); *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 417 N.E.2d 74 (N.Y. 1980).

Prior to this Court's decision in *Chemical Waste Management*, discriminatory taxes and fees had been a particular focus of state interest, presumably because they presented an opportunity to augment revenues by imposing a financial burden on out-of-state waste generators. Indeed, a 1992 survey found *14 States* contemplating such discriminatory fees. NSWMA, *Federal/State Issues Under RCRA* 1-11 (Jan. 1992).

These discriminatory laws, of course, have the effect of thwarting the safe and efficient disposal of waste by discouraging interstate movements of waste that -- as we have discussed (*see* pages 5-6, *supra*) -- are necessary in order to best accomplish those ends. They also may increase tensions among the States, precisely what the Commerce Clause was designed to prevent.

When this Court rendered its decision in *Chemical Waste Management*, reversing the Alabama Supreme Court decision that had upheld the discriminatory fee at issue in that case, the strict legal standard applicable to such discriminatory measures was made very clear. *See Chemical Waste Management*, 112 S. Ct. at 2014 ("[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry"). That no doubt deterred States from enacting these laws. As we next discuss, however, the Oregon Supreme Court's decision -- which takes a very narrow view of the scope of *Chemical Waste Management* -- has again muddied the governing legal principles and threatens to stimulate another wave of discriminatory state legislation.

B. The Oregon Decision Creates Intolerable -- And Unjustified -- Uncertainty Regarding The Scope Of This Court's Ruling in *Chemical Waste Management*.

This Court held in *Chemical Waste Management* that a waste disposal fee applicable only to interstate waste violated the Commerce Clause because the State could not "'justify [the discriminatory measure] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" 112 S. Ct. at 2014 (citation omitted). In the Oregon Supreme Court's view, that standard does not apply to user fees; as long as the fee is justified by reference to the costs incurred by the State, discrimination against interstate commerce is entirely permissible.

The inevitable result of that drastic narrowing of the *Chemical Waste Management* ruling will be a rush by other States to adopt discriminatory cost-based disposal fees. (Indeed, as discussed above, one State -- Indiana -- previously had adopted an identical statute.) Because only interstate commerce will be required to bear the "costs," however, it is

likely that States will attempt to inflate those numbers to the greatest degree possible. For example, Alabama could reenact the $72 per ton fee on out-of-state hazardous waste invalidated in *Chemical Waste Management* as a "cost-justified" fee, pointing to the State's administrative costs and the potential costs to Alabama in the event of a release of hazardous substances into the environment. In the wake of the Oregon court's decision, state legislators could argue that the Commerce Clause imposes few limits on their authority in this area.

Lawsuits will inevitably follow and courts will be required to choose between competing legal standards -- upholding the law under the rule adopted by the court below or striking it down under *Chemical Waste Management* pursuant to the reasoning applied by the Seventh Circuit in *Government Suppliers Consolidating Services v. Bayh*, 975 F.2d at 1283-1284.

There simply is no reason to allow such confusion to take root. This Court should make clear now that its ruling in *Chemical Waste Management* applies to all state exactions -- user fees as well as taxes.

* * * * *

We have focused in this brief on the effect of the decision below on the waste industry. As the petition observes, however, the Oregon Supreme Court's rationale is not limited to the waste context. Cost-based fees can be and are imposed by States in all sectors of the economy. Thus, rather than describing the entire effect of the Oregon court's decision, this brief in actuality provides an in-depth look at one small facet of the confusion wrought by that ruling. This Court should grant the petition for a writ of certiorari in order to make clear that discriminatory user fees, like discriminatory taxes, violate the Commerce Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 13, 1993

No. 93-70

In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Commerce Clause permits a State to levy a user fee only on interstate commerce, where both interstate and intrastate commerce impose similar costs upon the State and where the State could impose a nondiscriminatory user fee on both interstate and intrastate commerce.

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In the Supreme Court of the United States

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OREGON WASTE SYSTEMS, INC., AND GILLIAM COUNTY, OREGON, PETITIONERS

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DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

---

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. ("ATA"), is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. That industry consists of every type of motor carrier operation throughout the United States and includes tens of thousands of interstate

for-hire carriers, private carriers, and leasing companies.

The interstate trucking industry has been a frequent target of discriminatory state taxes and user fees. ATA and its members have therefore brought or participated in Commerce Clause challenges to a wide range of state taxes and fees before this Court and other state and federal courts. *See, e.g., Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992); *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987); *American Trucking Associations, Inc.* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993); *American Trucking Associations, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991); *Commonwealth of Kentucky, Transportation Cabinet* v. *American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988). In some of these cases, States have defended their discriminatory levies on a theory quite similar to the one adopted by the Oregon Supreme Court in this case—that a state user fee may discriminate against interstate commerce as long as the fee is cost-justified. *See American Trucking Associations, Inc.* v. *Secretary of Administration, supra; American Trucking Associations, Inc.* v. *New Hampshire*, No. 92-E-00604-B (N.H. Super. Ct.) (pending). ATA therefore has a strong interest in the issue presented in the certiorari petition.[1]

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.2.

ARGUMENT

THE OREGON SUPREME COURT'S DECISION ADDRESSES A LEGAL QUESTION OF GREAT PRACTICAL IMPORTANCE THAT SHOULD BE CONSIDERED BY THIS COURT

The Oregon Supreme Court upheld the facially discriminatory user fee at issue in this case on the ground that it was "a 'compensatory' fee for specific costs incurred by the state in the regulation of [out-of-state] waste" and that such fees "violate[] the Commerce Clause only where the amount of the fee is 'manifestly disproportionate to the services rendered.'" Pet. App. 18a (citations omitted). According to the Oregon Supreme Court, therefore, a State may explicitly single out interstate commerce for a significant financial burden without requiring intrastate commerce to compensate the State for the very same costs.

As the petition demonstrates (Pet. 12-20) and we discuss below (at pages 8-10), this holding sharply conflicts with this Court's decisions regarding the Commerce Clause standard applicable to user fees. Interstate commerce may be required to pay its fair share of a State's costs as long as intrastate commerce is subjected to the same obligation. But a State may not impose a substantial financial burden solely on interstate commerce unless it can "'justify [that discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2014 (1992) (citation omitted).

Even more critical for present purposes is the fact that the Oregon court's holding squarely conflicts with

other lower court rulings regarding the Commerce Clause standard applicable to user fees and will spawn considerable confusion regarding the States' power to discriminate against interstate commerce in imposing these frequently-used levies in all areas of state regulation. This Court should grant the petition for a writ of certiorari in order to prevent these adverse consequences.

A. The Question Whether The Commerce Clause Permits A State To Levy User Fees Expressly Limited To Interstate Commerce Has Tremendous Practical Significance.

States impose user fees in a variety of circumstances: to recover the costs of inspection and licensing programs, to generate funds for maintaining state-supported facilities used by businesses, and to compensate the State for other direct costs resulting from commercial ventures. Indeed, in this time of fiscal constraint, States appear to be turning to user fees more often in order to obtain funds needed to finance governmental activities.

The trucking industry, for example, must shoulder a variety of different fees exacted for the ostensible purpose of recovering various costs borne by the States in regulating highway transportation and maintaining and expanding our nation's roadways. Fees that the States have sought to impose include vehicle registration fees, fees for the many different licenses that a vehicle must obtain (for example, fuel use licenses and licenses for transporting specific types of substances), insurance registration fees, hazardous material transportation fees, fuel consumption taxes, mileage taxes, and weight-distance taxes.

With some frequency, these fees are drawn so as to impose a discriminatory financial burden on interstate trucking. That is the inevitable result of a political structure in which the state representatives enacting the levies seek to minimize the financial burden on their own constituents. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940); R. Posner, *Economic Analysis of Law* § 26.3, at 602 (3d ed. 1986) ("[e]ach state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states"); L. Tribe, *American Constitutional Law* § 6-5, at 409 (2d ed. 1988) ("state and local lawmakers are especially susceptible to pressures which may lead them to make decisions harmful to the commercial interests of those who are not constituents of their political subdivisions. That recognition reflects not a cynical view of the failings of statesmanship at a sub-federal level, but only an understanding that the proper structural role of state lawmakers *is* to protect and promote the interests of their own constituents") (emphasis in original).

This Court, and a number of lower courts as well, have been vigilant in striking down even facially neutral fees and taxes found to discriminate against interstate commerce by shifting a disproportionate amount of the cost burden away from intrastate trucking and on to interstate trucking. *See, e.g.*, *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987); *American Trucking Associations, Inc.* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993); *American Trucking Associations, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991); *American Trucking Associations, Inc.* v. *Gray*, 746

S.W.2d 377 (Ark. 1988), rev'd in part on other grounds, 496 U.S. 167 (1990); *American Trucking Associations, Inc.* v. *Goldstein*, 541 A.2d 955 (Md. 1988); *Commonwealth of Kentucky, Transportation Cabinet* v. *American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988).

Under the legal standard adopted by the Oregon Supreme Court, however, the discriminatory character of these fees apparently would be legally irrelevant. As long as a fee could be justified on the basis of the State's costs, it would pass muster under the Commerce Clause despite the presence of clear discrimination against interstate commerce (here, for example, intrastate commerce is entirely exempted from the burden imposed on interstate commerce even though the costs Oregon seeks to recover are common to disposal of all waste).

Such a revolutionary change in Commerce Clause doctrine would make it very difficult for the interstate trucking industry to protect itself against discriminatory state levies. Indeed, the very argument accepted by the Oregon court has been advanced—and rejected—in several cases challenging discriminatory highway fees and taxes.

American Trucking Associations, Inc. v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), for example, was a challenge to facially neutral license fees imposed by the Commonwealth of Massachusetts. Funds generated by these fees were reserved for purposes of funding related state activities (*see id.* at 98-99). The Commonwealth attempted to justify its $200 per truck hazardous waste transporter fee by asserting that the fee was based on the annual cost of the transporter enforcement program (*id.* at

102). The state supreme court rejected that argument, stating that even if the fee were justified by reference to the Commonwealth's costs, the fee was invalid under the Commerce Clause because the manner in which those costs were allocated among transporters discriminated against interstate commerce (*ibid.*). The court further rejected the Commonwealth's assertion that the user fees should be measured against a Commerce Clause discrimination standard different from the one applicable to taxes. *Id.* at 99 n.9, 102.[2]

A similar argument was made in *American Trucking Associations, Inc.* v. *New Hampshire*, No. 92-E-00604-B (N.H. Super. Ct.), a challenge to New Hampshire's hazardous waste transporter fees.[3] The State argued there that "[b]ecause the Fees are collected merely to offset the costs of necessary state regulation, and not to raise revenue, they are not taxes under state or federal law"; such "fees" assertedly are subject to a more lenient Commerce Clause anti-discrimination standard. N.H. Mem. of Law at 13. The trial court rejected that position, concluding that the user fee must pass muster under the anti-discrimination rules this Court applied to "taxes" in *Scheiner*. *American Trucking Associations, Inc.* v. *New Hampshire*, No. 92-E-00604-B (N.H. Super. Ct. Apr. 19, 1993) (denying motion to dismiss).

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[2] The court found that the fee also was invalid on the ground that it did not approximate the benefits received by the interstate truckers.

[3] New Hampshire levies a $200 per company annual application fee and a $100 per vehicle unit fee (the tractor-trailers that carry goods interstate are classified as two units and would therefore be assessed a $200 per truck fee).

The State is continuing to press the argument in its interlocutory appeal.

If the Oregon decision is permitted to stand, States will seize upon it in support of efforts—like those already attempted by Massachusetts and New Hampshire—to exempt discriminatory user fees from scrutiny under the Commerce Clause. And there is no reason to suppose that those efforts will be restricted to waste disposal fees or highway fees. They would likely extend to user fees in every area of the economy.

That will produce confusion in the lower courts regarding the proper legal standard for assessing the constitutionality of such fees under the Commerce Clause—whether the "manifestly disproportionate to services rendered" test is the only one that user fees must satisfy or whether such fees must also pass muster under the anti-discrimination principle applicable to other types of mandatory payments to the States. In addition, state legislators considering how to structure user fees will be uncertain regarding the constitutional limits on their authority. There simply is no reason to allow such uncertainty to fester. This Court should act now to make clear that the Oregon court fundamentally erred in exempting user fees from the Commerce Clause's anti-discrimination principle.

B. User Fees That Discriminate Against Interstate Commerce Violate The Commerce Clause.

The petition amply demonstrates that the Oregon court's truncated constitutional standard is wholly inconsistent with this Court's decisions in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *American Trucking Associations, Inc.* v. *Scheiner, supra.* See Pet. 13-14. The Court has made clear that user fees must be *both* nondiscriminatory *and* fairly related to the costs incurred by the State. *Delta Airlines*, 405 U.S. at 716-717; *Scheiner*, 483 U.S. at 289-290.

Indeed, this Court over 100 years ago rejected the very argument adopted by the Oregon Supreme Court in the present case. At issue in *Guy* v. *City of Baltimore*, 100 U.S. 434 (1880), was a city ordinance that imposed wharfage fees for the landing on public wharves of non-Maryland merchandise; Maryland goods were exempt from the fees. The city argued that "those operating vessels, laden with the products of other States, cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the city's property." 100 U.S. at 441. Declaring that proposition "unsound both upon principle and authority," this Court held that the fees violated the Commerce Clause because they imposed a discriminatory burden on interstate commerce. *Id.* at 442-443.

Any other rule would be completely unworkable. States would have a tremendous incentive to characterize as many exactions as possible as "user fees" in order to avoid the prohibition against discriminatory measures. Such a loophole in the protections conferred by the Commerce Clause, in turn, would leave reviewing courts in a quandary. Some would uphold levies bearing even the most tangential relationship to the State's costs; others might require a somewhat closer relationship between the amount of the fee and the costs to the State. In any event, considerable litigation—and much variation in approach—would certainly result.

The "very purpose" of the Commerce Clause was to establish "an area of free trade" among the States by forbidding discriminatory treatment of each other's products and trade. *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944); *see also Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979). The Oregon Supreme Court's decision is squarely inconsistent with the core Commerce Clause principle that discrimination against interstate commerce cannot be tolerated. That decision should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Nos. 93-70 and 93-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC. and
GILLIAM COUNTY, OREGON,
Petitioners,
v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,
Respondents.

COLUMBIA RESOURCE COMPANY, L.P.,
a Washington limited partnership,
Petitioner,
v.

ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF FOR PETITIONER COLUMBIA RESOURCE COMPANY, L.P.

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QUESTION PRESENTED

Did the Oregon Supreme Court err when, under the Dormant Commerce Clause, it sustained the State's imposition of a surcharge on out-of-state waste disposed of in Oregon where the surcharge purports to recover costs incurred by the State and where in-state waste is not similarly burdened? *

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* Contained in this brief's caption are the names of all parties to the proceeding in the Oregon Supreme Court.

Petitioner Columbia Resource Company has no parent or subsidiary companies. Supreme Court Rule 29.1.

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BRIEF FOR PETITIONER COLUMBIA RESOURCE COMPANY, L.P.

OPINIONS BELOW

The Oregon Supreme Court's opinion in *Gilliam County v. Department of Environmental Quality*, 316 Or. 99, 849 P.2d 500 (1993), is reproduced in the

petition for writ of certiorari at Appendix A. Appeal to that court was taken from the decision of the Oregon Court of Appeals, 114 Or. App. 356, 837 P.2d 965 (1992), which is reproduced in the petition at Appendix B.

JURISDICTION

The Oregon Supreme Court entered its judgment on June 9, 1993. On July 14, 1993, petitioner Columbia Resource Company, L.P. filed with this Court a petition for writ of certiorari, which petition was granted on September 28, 1993. This Court has jurisdiction to review by certiorari the decision of the Oregon Supreme Court pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The pertinent text of the following statutes and regulations is reproduced in the petition for writ of certiorari at Appendix C: ORS 183.400, ORS 459.015, ORS 459.297(1), ORS 459.298, OAR 340-61-115(1), and OAR 340-61-120(6).

United States Constitution, Article I, section 8, clause 3 provides:

> Congress shall have the power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

In response to growing public pressure (R.0079), the Oregon Legislature, in 1989, enacted comprehensive waste reduction legislation. House Bill 3515, Or. Laws 1989, Ch. 833. Anxious that continued disposal in Oregon of instate *and* out-of-state waste

would reduce capacity available to instate waste,[1] ORS 459.293(2),[2] the legislature declared "[t]here is a shortage of appropriate sites for landfills in Oregon" and that "[i]t is in the best interests of the people of Oregon to extend the useful life of solid waste disposal sites by * * * requiring solid waste to undergo volume reduction through recycling and reuse measures before disposal * * *." ORS 459.015 (1)(c), (d). Sections 155 and 156 of House Bill 3515 provide for a surcharge on solid waste generated outside the State of Oregon and disposed of within the State. Sections 155 and 156 were codified as ORS 459.297 and 459.298.

ORS 459.298 directs Oregon's Environmental Quality Commission (EQC) to establish by rule a surcharge on the disposal of foreign waste based upon the costs to the State and its political subdivisions of disposing of solid waste generated outside the State. Aware, however, that a surcharge fixed too high might discourage importation of foreign waste, with a consequent loss of revenue and, conversely, that a fee set too low might likely accelerate lost capacity, EQC labored for an optimal "political valuation." (R. 0661; 0688.)

In December 1990, EQC amended Oregon Administrative Rules 340-61-115 and 340-61-120[3] to reflect a surcharge of $2.25 per ton on foreign waste. Sec-

---

[1] In the interest of readability, out-of-state waste will be referred to as "foreign" waste and instate waste referred to as "domestic."

[2] ORS 459.293 was renumbered in 1991 as 459A.105. Or. Laws 1991, Ch. 385, § 91.

[3] OAR 340-61-115 and 340-61-120 are currently renumbered as 340-97-110 and 340-97-120, respectively.

tions 152 and 153 of House Bill 3515, ORS 459A.110 and 459A.120 (formerly ORS 459.294 and 459.295, respectively), direct as well that EQC establish a fee on domestic waste. The fee on domestic waste, however, is not cost driven; it is a revenue device for supporting environmental protection programs, solid waste planning, and recycling. ORS 459A.120. The fee on domestic waste, moreover, is statutorily limited to $.50 per ton regardless of actual costs. ORS 459A.110(5).[4]

Unlike the domestic fee, the surcharge on foreign waste is not statutorily capped but is, instead, comprised of the following identified "costs":

1. **Statewide activities for reducing environmental risk and improving solid waste management—$.58 per ton.** According to Oregon's Department of Environmental Quality (DEQ), $.42 of this category equals the amount of general fund revenues allocated to solid waste programs, including $.10 for domestic waste reduction activity, $.08 for administrative rulemaking, $.08 for statewide policy, $.08 for administering regulatory programs, and $.08 for statewide solid waste management planning. (R. 0866; 0896-0897.) The remaining $.16 is allocable to a portion of the $.50 fee previously assessed on domestic waste, monies similarly dedicated to waste reduction and recycling, ground water monitoring, and planning activities by and grants to local government units for disposal and recycling. ORS 459A.120.

2. **Reimbursements to the state for tax credits and other public subsidies—$.66 per ton.** Although this category remains in force, EQC recently made access to the tax credits substantially more difficult. *See* OAR Ch. 340, Div. 16.

3. **Solid waste reduction activities related to the review and certification of waste reduction and recycling plans—$.05 per ton.** This charge apparently includes the cost of reviewing waste reduction and recycling plans of sending jurisdictions. (R. 0932); *See also*, ORS 459.305. The per ton assessment, however, will continue long after any given plan is approved. (R. 0441.)

4. **Increased environmental liability—$.72 per ton.** Although DEQ estimated the likelihood of petitioner's responsibility for $50 million worth of unfunded environmental liability at one tenth of one percent (R. 0679), EQC calculated this charge assuming a 100% probability of a $90 million cleanup. (R. 0681.)

5. **Lost disposal capacity—$.20 per ton.** This component includes environmental studies and political deliberations associated with siting new landfills. (R. 0884.)

6. **Publicly supported infrastructure—$.03 per ton.** Among the "costs" comprising this category are

[4] Apparently concerned that invalidation by the courts of the $2.25 per ton surcharge would create a situation in which only domestic waste was subject to an additional levy, the Oregon Legislature in 1991 amended the statute to increase the instate fee to $.85 per ton and to subject foreign waste to the same $.85 per ton charge as domestic waste. *See* ORS 459A.110(6) (as amended by 1991 Or. Laws Ch. 385, § 13). (This fee was added to the $2.25 surcharge, which was left in place by the Legislature.) If the $2.25 per ton surcharge ultimately is upheld by the courts, however, the $.85 per ton fee would again be limited to domestic waste. Or. Laws 1991, Ch. 385, §§ 91 and 92. Thus, the ultimate result would be much the same as under the original 1989 law—the charge on domestic waste would be $.85 per ton, while the surcharge on foreign waste would be $2.25 per ton.

highway maintenance, additional rail crossings, and increased traffic patrolling (R. 0687); petitioner, however, transports its waste via barge.

7. **Nuisance impacts from transportation—$.01 per ton.** DEQ conceded the use of traffic accident statistics gleaned from PUC records as a "proxy" for measuring loss of "quiet enjoyment." (R. 0688; 0896.) Petitioner transports by way of barge which has no relation to highway traffic statistics.

Despite the differential fees assessed, there is no distinction in composition or quality between domestic and foreign waste. ORS 459.305 requires that all waste disposed of in Oregon landfills, except for waste generated in the county of disposal, comply with equivalent waste reduction and recycling standards applicable to domestic waste.

With this in mind, petitioner, a company that collects waste generated in Clark County, Washington, and arranges for its transport to and disposal at a landfill in Morrow County, Oregon, instituted a rule challenge in the Oregon Court of Appeals claiming, among other things, a violation of the Commerce Clause of the United States Constitution.[5]

The court of appeals upheld the rules, holding that the surcharge is a compensatory fee given its restriction to disposal costs. As such, the court of appeals believed the surcharge facially reasonable and, because ORS 183.400 limits the court's constitutional scrutiny to the face of the rule,[6] found petitioner

[5] Oregon's Administrative Procedures Act authorizes judicial review of administrative rules pursuant to ORS 183.400.

[6] In fact, judicial review authorized by ORS 183.400(3) is somewhat broader. Courts may consider:

> (a) The rule under review;
>
> (b) The statutory provisions authorizing the rule; and
>
> (c) *Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.*
>
> (Emphasis supplied). Accordingly, ORS 183.400(4) empowers courts to invalidate rules if they:
>
> (a) *Violate*[] *constitutional provisions;*
>
> (b) Exceed[] the statutory authority of the agency; or
>
> (c) [Were] adopted without compliance with application rulemaking procedures.
>
> (Emphasis supplied).

precluded from proving the surcharge disproportionate to the costs incurred. (Pet. App. 67.)

Petitioner thereafter petitioned the Oregon Supreme Court for review and, after granting the petition, that court likewise upheld the rules, finding their nexus to the State's costs a discernible basis, apart from origin, for treating foreign waste differently, despite the absence of any corresponding surcharge on domestic waste. (Pet. App. 26.)

SUMMARY OF ARGUMENT

The $2.25 per ton surcharge assessed by the State of Oregon on foreign waste purports to recover costs incurred by the State in the administration of its solid waste program. Under the statutory scheme, the State would collect only $.50 per ton on domestic waste. The Oregon Supreme Court rejected petitioner's constitutional challenge to the surcharge, accepting the State's claim that the nexus between the surcharge and costs incurred was constitutionally sufficient. Unfortunately, the court's analysis was incomplete because it failed to inquire whether inter-

state commerce is similarly burdened. Because the Oregon court's reasoning makes no reference to a corresponding burden on domestic waste, the court either dispensed entirely with the discrimination standard or misapplied it. The Commerce clause demands equal treatment of interstate and intrastate commerce.

Oregon's surcharge on foreign waste discriminates against foreign consumers of Oregon landfill capacity; the burden, therefore, shifts to the State to justify the surcharge by demonstrating the consequent local benefits and the unavailability of nondiscriminatory alternatives adequately serving the State's interests. The Oregon Supreme Court failed to apply this test. In any event, a finding of discrimination is dispositive because a uniform charge on waste generated both within and without Oregon is an obvious and readily available nondiscriminatory alternative.

That Oregon's surcharge on foreign waste discriminates against foreign generators of waste is apparent. First, the surcharge discriminates on its face. The differential fee structure exacts from foreign consumers of landfill capacity $2.25 for each ton disposed; Oregonians, on the other hand, must pay just $.50 per ton.

Second, the surcharge discriminates in its purpose. The surcharge on foreign waste is the product of Oregon's finding that disposal within the State of domestic *and foreign* waste will ultimately reduce the capacity available to domestic consumers. By recovering costs only from foreign consumers, the State seeks to secure for Oregonians a priority over its landfill capacity.

Third, the surcharge discriminates in its effect. Because many of the surcharge's components are abstractions and contingencies, they are not costs at all. Assuming they are valid costs, however, the State cannot justify its failure to collect them from Oregonians as well. And, even assuming the State is collecting its costs indirectly from Oregonians, its assessment of a consumption tax exclusively on foreign consumers discourages use of the State's landfills in a manner from which domestic consumers are exempt.

These discriminatory characteristics, taken alone or considered together, present the State with a burden of justification it cannot carry. To the extent the Oregon Supreme Court found otherwise, it should be reversed.

ARGUMENT

I. THE OREGON SUPREME COURT ERRED WHEN IT FAILED TO STRIKE THE PURPORTEDLY COST DRIVEN SURCHARGE ON FOREIGN WASTE BECAUSE DOMESTIC WASTE SUFFERS NO CORRESPONDING BURDEN.

Inconsistent with this Court's fundamental decree that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), the Oregon Supreme Court sanctioned the State's assessment of a $2.25 per ton surcharge on foreign waste despite a corresponding charge on domestic waste statutorily limited to $.50 per ton. As a prelude to exploring the innumerable constitutional infirmities of Oregon's misdirected "cost" recovery scheme, it remains first to discuss why the Oregon court's decision is the product of inadequate constitutional reasoning.

Solid waste is an article of commerce; Oregon is therefore subject to scrutiny under the Commerce Clause when it restricts waste's movement. *Philadelphia v. New Jersey*, 437 U.S. 617, 622-623 (1978). The Oregon Supreme Court accepted as much. (Pet. App. 23.) It also accepted the State's view that because the surcharge on foreign waste is ostensibly designed to recover regulatory costs, it is a compensatory fee. (Pet. App. 27.) Given this combined acceptance, then, a precise constitutional standard prevails: A compensatory fee is constitutionally impermissible if (1) it is not based upon a fair approximation of use; or (2) it *discriminates against interstate commerce*; or (3) it is excessive compared with the governmental benefit conferred. *Evansville-Vanderburgh A.A. Dist. v. Delta Airlines, Inc.*, 405 U.S. 713, 716-717 (1972).

If the surcharge is discriminatory, "it is typically struck down without further inquiry." *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ——, 112 S.Ct. 2009, 2014 (1992). Should a court choose to inquire further, the burden shifts to the State "to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington Apple Advertising Comm'n.*, 432 U.S. 333, 353 (1977). Combined with this justification, Oregon must demonstrate that its discriminatory treatment "is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 502 U.S. ——, 112 S.Ct. 789, 801 (1992).

Despite the clarity of these principles, it is difficult to follow their application by the Oregon court. The

court began by cautioning that an origin provoked surcharge on foreign waste would necessarily fail under the Commerce Clause. (Pet. App. 23-24) (Citing *Chemical Waste*, 112 S.Ct. at 2013-15). Oddly, then, the court referred to the fee as "a differential charge," one statutorily actuated by the Oregon state line. (Pet. App. 24.) From this reference, and from the court's finding that the State met its burden of justifying the surcharge (Pet. App. 26), the court must have found the surcharge discriminatory. *See Wyoming*, 112 S.Ct. at 801.

The court, though, equivocated. Because the surcharge is driven by costs, found the court, it does not discriminate on its face; however, the opinion follows with, "[t]hrough the statutory and regulatory criteria, the State has met its burden of showing that the surcharge 'is jusified by a valid factor unrelated to economic protectionism'" (Pet. App. 26)—language relevant only where discrimination exists. *Chemical Waste*, 112 S.Ct. at 2015. If the court considered the surcharge nondiscriminatory, the State need not justify the statutory scheme. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). If, instead, the court considered the surcharge discriminatory, its analysis is constitutionally incomplete. The State must not only distance its discriminatory fee from economic protectionism, it must as well "justify [the discrimination] in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353. The Oregon court declined to apply these principles.

The court's disinclination to squarely confront the discrimination question reappears in its discussion of compensatory fees. When citing the pertinent test

announced in *Evansville-Vanderburgh*, the court in parenthesis wrote, "fees reflecting a fair approximation of the use of facilities and not excessive in relation to costs incurred do not violate the Commerce Clause * * *." (Pet. App. 28.) Conspicuously absent from the parenthetical is the additional requirement that compensatory fees not discriminate against interstate commerce. *Evansville-Vanderburgh*, 405 U.S. at 716-717. This emasculated version of the test improperly insulated the State from its burden of justifying the discriminatory surcharge; a burden it cannot carry.

Chemical Waste provides the analytical model the Oregon court should have followed. Like Oregon's $2.25 surcharge assessed exclusively on foreign solid waste, Alabama assessed a $72 per ton fee exclusively on foreign hazardous waste. Also like Oregon, among the justifications advanced in defense of the Alabama fee was recovery of compensatory revenue for the costs and burdens imposed by foreign waste generators. 112 S.Ct. at 2014. Granting that such an interest might be legitimate, this Court regarded the explicit distinction between foreigners and Alabamans as facially discriminatory, activating the State's three-pronged burden of justification: (1) local benefits, (2) absence of nondiscriminatory alternatives, and (3) presence of a factor unrelated to economic protectionism. *Id.* at 2014-2015. In view of a generally applicable per ton fee on *all* hazardous waste as an obvious nondiscriminatory alternative for furthering Alabama's interests, the State succumbed to its burden.

Had the Oregon Supreme Court engaged this analytical framework, the surcharge on foreign waste would have been similarly "stricken."

II. THE OREGON COURT'S MISAPPLICATION OF THE LEGAL STANDARD IS COMPOUNDED BY ITS FAILURE TO RECOGNIZE THE DEPTH AND DIVERSITY OF DISCRIMINATION INHERENT IN THE STATE'S SURCHARGE ON FOREIGN WASTE.

Insofar as the Oregon court viewed the surcharge as both nondiscriminatory *and* properly justified, the court's position on discrimination is not clear. What is clear is the court's failure to recognize the several ways in which the surcharge transgresses the Commerce Clause's antidiscrimination principle. "The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause." *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318, 329 (1977). "The very purpose of the Commerce Clause," wrote this Court in *McLeod v. J. B. Dilworth Co.*, 322 U.S. 327, 330 (1944), "was to create an area of free trade among the several states." The operative principle, of course, is that "the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The principle serves as a counterweight against the parochial inclinations of state legislatures and averts "a multiplication of preferential trade areas." *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). Discriminatory laws, therefore, are presumptively forbidden. *Chemical Waste*, 112 S.Ct. at 2014.

In this case, the question of discrimination is dispositive because the limited form of judicial review authorized by Oregon's Administrative Procedures Act disables, in large part, the State from factually justifying its discriminatory treatment of foreign

waste. *See* ORS 183.400. Moreover, assuming the State could justify its discriminatory treatment of foreign waste, a uniform charge on waste generated both within and without Oregon is clearly an adequate nondiscriminatory alternative. *See Chemical Waste*, 112 S.Ct. at 2015. Rather than select the obvious nondiscriminatory alternative, Oregon imposed a differential fee on foreign waste; a fee that discriminates against interstate commerce on its face, in its purpose, and in its effect.

A. The Surcharge on Foreign Waste Discriminates on Its Face Because Its Terms Require Disparate Treatment of Interstate and Intrastate Waste.

This Court's precedents uniformly hold that legislation requiring different treatment of interstate and intrastate commerce constitutes facial discrimination. *E.g., Armco, Inc.*, 467 U.S. at 642. A facially discriminatory surcharge is subject to this Court's strictest scrutiny and may, itself, be a fatal defect. *Hughes v. Oklahoma*, 441 U.S. 335, 441 (1979). Indeed, facially discriminatory laws are virtually per se invalid. *Philadelphia*, 437 U.S. at 624.[7]

Like the additional $72 per ton fee considered facially discriminatory in *Chemical Waste*, the Oregon surcharge recovers $2.25 for each ton of foreign waste, $1.75 more than it recovers for domestic waste. It is precisely that explicitness which renders the surcharge constitutionally suspect. The administrative rules perpetuate the problem. The administrative scheme, OAR 340-97-110 and 120, requires foreign generators of waste to fund contingent environmental liability through a form of risk premium as a component of the surcharge; Oregonians, however, are not reciprocally burdened. *Compare* (R. 0676-0681) *with* ORS 459A.120. The same rings true for infrastructure and nuisance impacts—the surcharge exacts from foreign generators a fee for these "costs" from which Oregonians are exempt. *Compare* (R. 0687-0689) *with* ORS 459A.120.

Because the surcharge explicitly distinguishes between foreign and domestic generators of waste, it is facially discriminatory. As such, if not unconstitutional per se, the State must engage its burden of justification—a burden it cannot carry.

B. The Surcharge on Foreign Waste Discriminates Because in Purpose and Effect It Is the Product of Economic Protectionism.

Through its surcharge on foreign waste, Oregon manifests, on behalf of its citizens, a misconceived priority over the State's landfill capacity; a misconception that renders the surcharge virtually per se invalid as economic protectionism. *Philadelphia*, 437 U.S. at 624. The Oregon Supreme Court acknowledged the rule. (Pet. App. 22-23.) What the court unfortunately did not acknowledge, however, is that economic protectionism inheres in legislation either calculated to or *having the effect of* saddling those

[7] There prevails a strict constitutional presumption against explicit embargoes, irrespective of purpose. *Regan, the Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1134 (1986). From a constitutional perspective, any economic disadvantage is the same as an outright ban or embargo. *New Energy Co. v. Limbach*, 486 U.S. 269, 309 (1988). Professor Regan suggests that States be called upon to produce clear and convincing evidence of innocent purpose to justify explicit treatment of interstate commerce; as an aside, he adds, "explicit laws will rarely be upheld." *Regan*, supra at 1135.

outside Oregon with a disproportionate burden of conserving Oregon's landfill capacity. *Chemical Waste*, 112 S.Ct. at 2015, n.6. The Oregon court misapplied the protectionism principle when it concluded that the State's effort to recover environmental regulatory "costs" is sufficient, standing alone, to withhold the label "economic protectionism." (Pet. App. 26.) Indeed, in *Chemical Waste*, the Alabama Supreme Court was similarly mistaken, prompting the following from Justice White:

> The Alabama Supreme Court found no "economic protectionism" here * * * based on its conclusions that the legislature was motivated by public health and environmental concerns. This narrow focus on the intended consequence of the additional fee does not conform to our precedents, for "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either *discriminatory purpose* * * * *or discriminatory effect* * * *." The "virtual per se rule of invalidity" applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade."

112 S.Ct. at 2015, n.6 (emphasis supplied) (citations omitted).

Oregon's surcharge on foreign waste qualifies in both respects: Its purpose is the preservation of landfill capacity for Oregonians and, purpose aside, it will plainly have that effect.

1. *The Surcharge Is a Product of Protectionist Purpose.*

Oregon's 1989 Legislature proclaimed, "[t]he disposal in Oregon of * * * solid waste generated both *outside* and within Oregon will reduce the total capacity available for disposal of * * * solid waste generated in this state * * *." ORS 459A.105(2) (formerly ORS 459.293(2)) (emphasis supplied). A sponsor of the surcharge in the Oregon Legislature, State Senator Dick Springer commented, "we feel that Washington State ought to develop their [sic] own instate landfill capacity for municipal solid waste." (R. 0016.) The State's purpose is clear. Oregon, however, may not "attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade." *Chemical Waste*, 112 S.Ct. at 2012.

Legislation, including subsequent environmental regulation, is the product of protectionist purpose if it is calculated to improve the competitive position of local economic actors vis' a vis' their foreign competitors.[8] *Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1097 (1986). This definition of protectionism contemplates more than a

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[8] It is of no consequence that the surcharge burdens access by foreign consumers to local natural resources instead of the more paradigmatic burden on access by foreign producers to local markets. Consumer and resource protectionism qualify as economic protectionism. *Regan, supra* at 1271. According to Professor Regan, explicitness is all but conclusive evidence of protectionist purpose. *Id.* at 1145. The mere fact of a $2.25 surcharge assessed exclusively on foreign waste, therefore, is strong evidence of Oregon's purpose. Moreover, significant protectionist effect also serves as persuasive evidence of protectionist purpose. *Id.* at 1136. *See* discussion, post at p. 22.

State's intent to confer an absolute advantage upon its citizens; it includes as well a State's effort to alleviate an alleged local disadvantage. *Id.*

Even the State's most plausible argument in defense of the surcharge, therefore, is a product of protectionist reasoning. As statutorily tied to "costs," one ostensible purpose of the surcharge is to relieve what is presumed to be the subsidized use by foreign consumers of Oregon landfills and other associated facilities. (R. 0881.) That purpose, however, even if genuine, is calculated to alleviate a local disadvantage and is therefore protectionist in purpose. *See Regan*, *supra* at 1097.

No fine distinctions, though, are necessary to appreciate the protectionism inherent in the State's other articulated purposes. In response to growing public concern [9] (R. 0079), the State enacted a surcharge on foreign waste to preclude reference to Oregon landfills as a low cost option. (R. 0018.) Undermining the Oregon court's cost rationale and offering insight into the administrative process is the following from DEQ's Fiscal and Economic Impact Statement:

> [I]f the surcharge is set "too low," it could encourage disposal of larger amounts of out-of-state solid waste in Oregon, and diminish the effective life of Oregon landfills. * * * If the surcharge is "too high," it could discourage the disposal of out-of-state solid waste. This might in turn indirectly discourage the establishment of new regional landfills * * * in Oregon * * *.

[9] Resident opposition to foreign medical waste has confined the recently constructed medical waste incinerator in Worden, Oregon, to domestic waste processing. (R. 0080.)

> Instate levels of solid waste generation might not be sufficient to warrant the development of new landfills; or instate solid waste disposal rates might have to be raised more to cover the cost of new landfills when they eventually become necessary, without the contribution of out-of-state disposal fees to construction and operation costs.

(R.0213-0214.) This language smacks less of identifying costs and more of striking a political balance between landfill consumption and acquisition of foreign revenue.

The record, in fact, strongly suggests that the State did not identify costs, rather, it chose them; [10] a choice driven, at least in part, by the stigma of receiving foreign waste. The following colloquy from an EQC work session leading up to the rules' adoption illustrates the point:

> Representative Cease: [Foreign waste] becomes also an important fact for the people of the State in economic terms. On the other hand, it is also true that if you were to tell the residents of my area of Portland, or other

[10] In fact, the entire administrative process smelled of volume control:

> Annual volume of waste disposed of is estimated to be about 600,000 tons eventually (*total for all Oregon landfills expected to accept out-of-state waste*). A six percent decrease in volume would be 36,000 tons, resulting in an annual revenue loss of 900,000 (at $25/ton) to the landfill operator. A $3.50 surcharge would cause a 14 percent increase in disposal charges, and, at an elasticity of one, would result in an annual revenue loss of $2.1 million to the site operator.

(DEQ's Fiscal & Economic Impact Statement, R. 0214.)

people in the State tomorrow that we weren't going to have any more solid waste coming into the State, they would say why the hell were we having it come in in the first place? They're not going to buy any economic argument, they're not going to buy any argument that that justifies that. If you left it up to a lot of residents out in the community, if I showed it to my constituents, they would say we don't need it, we would like to prevent it. * * * I am a strong regionalist in this regard. I think you have to look at it in that sense. Now that's not to say I want to end up bringing waste from California. I do not. * * * I would also say to you that I don't want all the waste in the region coming to Oregon. * * *.

EQC Chair: Appreciate your interest and thoughts. Any questions?

Commissioner Lorenzen: Well, I have a question, one thing that strikes me is the first introduction to this process or this particular problem, there seem to be two themes going through this, one is that we don't want out-of-state waste in Oregon, second theme is given that it is a desirable thing or a neutral thing to bring waste in, we have certain costs imposed on the state as a result of bringing fees in. I guess nothing is ever pure, but what is, what really is driving this? Is it a cost issue, or is it a more or less social desirability issue * * *?

Representative Cease: Well, I, from my vantage point, I think there has to be some sort of balance. I think the economic factor is a factor. It is not the sole factor. There are political factors, there are public perception factors, all of those are part of it.

(R. 0023-0027.) Following EQC's adoption of a preliminary surcharge set at $2.70, the surcharge was referred to the Emergency Board, an interim legislative committee, for approval. During its work session, an exclamation point was placed after this idea of politically motivated "cost" selection by an Emergency Board member who, although an opponent of the importation of foreign waste, could not endorse DEQ's methodology:

> I doubt there is anyone here on the E-Board that says we ought to establish a charge low enough so that refuse can come in from out of state and be running on our highways and filling up Oregon's acres of land, but I also think that we did accept a figure too high, and that it'll probably tend to discourage the transportation in, which may be a great thing to do, but the charges in some categories, I believe, are artificial and really still not from a practical standpoint, or a budgetary standpoint can be supported.

(R. 0118-0119.)[11]

Oregon's surcharge on foreign waste is the product of an unabashed effort by the State to improve the competitive position of its citizens vis-à-vis their foreign competitors over access to the State's landfill capacity. An avowed effort of this kind is discriminatory and is either constitutionally invalid per

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[11] Petitioners, incidently, are not alone in their frustration. Mike Conway, a private citizen, testified before EQC: "I still live in Portland, fourth generation, work in Washington, I still pay Oregon tax. I have Washington people working in Oregon who still pay Oregon tax. Where do we stop the wars? That's all." (R. 0279-0280.)

se or activates the State's burden of justification; a burden it cannot carry.

2. *The Surcharge Breeds Protectionist Effect.*[12]

The Oregon Supreme Court failed to recognize that discrimination may manifest itself in the means as well as the ends of legislation. *Philadelphia*, 437 U.S. at 626. No court is bound by the name given a law; it will, rather, determine for itself the enactment's practical impact. *Hughes*, 441 U.S. at 335. Method, therefore, matters. *Westinghouse Corp. v. Tully*, 466 U.S. 388, 398 (1984). Specifically, "[d]o the methods by which the * * * taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause?" *American Trucking Assn. v. Scheiner*, 483 U.S. 266, 282 (1987). Yet more to the point, "[t]he way in which a tax levied on participants in interstate commerce is measured and assessed bears directly on whether it implicates central Commerce Clause values." *Id.*[13] The manner

[12] The effects deducible from the face of the surcharge to which petitioner refers should be distinguished from those effects following from the surcharge in its operation. This Court routinely hypothesises discriminatory effect. *E.g. Armco*, 457 U.S. at 644 (challenger need not prove actual discriminatory impact); *Westinghouse Corp. v. Tully*, 466 U.S. 388, 406-407 (1984) ("when a tax, on its face, is designed to have discriminatory economic effects, the court 'need not know how unequal a tax is before concluding that it unconstitutionally discriminates' ") (Quoting *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981).

[13] Professor Regan similarly defines protectionist effect: Any improvement in the competitive position of local economic actors vis' a vis' their foreign competitors. *Regan, supra* at 1095.

in which the surcharge on foreign waste is levied plainly implicates the central Commerce Clause value of anti-discrimination because many of the surcharge components are simply not costs at all; assuming they are costs, Oregonians are not likewise paying them; and even assuming Oregonians are likewise paying them through other means, foreigners are still the losers.

a. *Many Components of the Surcharge Are Simply Not Costs at All.*

User fees calculated to recover costs are lawful so long as they are fixed by a uniform, fair, and practical standard. *Evansville-Vanderburgh*, 405 U.S. at 713. Similarly, the means calculated to achieve cost recovery must be narrowly tailored to achieve that end. *See Sporhase v. Nebraska*, 458 U.S. 941, 958 (1981). Moreover, despite the State's efforts to conceive a wide array of "costs" and rationalize them with figures and computations, discriminatory treatment is forbidden "whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940).

The seminal cases in the user fee context illustrate the liberties taken by Oregon with the term "costs." In *Clark v. Paul Gray*, 306 U.S. 583 (1939), this Court upheld a caravaning statute designed to recover specific identifiable costs associated with *highway maintenance and police staffing*. In *Evansville-Vanderburgh*, 405 U.S. 707 (1972), Justice Brennan viewed favorably Indiana and New Hampshire statutes contemplating recovery from enplaning passengers costs of *airport construction and maintenance*. The surcharge at issue here, on the contrary, is com-

prised of "costs" far less tangible.[14] Many of the "cost" components are either imprecisely tailored, and therefore over inclusive, or represent worst case contingencies.[15] A few examples will demonstrate.

Among those "costs" sweeping too broadly is category number 1 (statewide activities for waste reduction and management), $.10 of which is dedicated specifically to waste reduction in Oregon. (R. 0896.) Foreign consumers of landfill capacity manifestly do not contribute to the amount of waste generated in Oregon. Regulatory costs for reducing waste production by Oregonians are simply not attributable to foreign consumers.

Also, the State seeks to exact $0.1 per ton for its residents' loss of "quiet enjoyment" along transit routes. (R. 0026.) Although a conceptual detriment to a small class of residents, there is no cost to the State—certainly none of this money nor any corresponding portion of general fund revenue from domestic generators is paid to property owners for their

[14] To adequately appreciate the distinction between highway maintenance and airport construction and maintenance at issue in *Clark* and *Evansville*, respectively, it is critical to note that the costs Oregon seeks to recover are, in large measure, "costs" of its own creation. $.63 of the $2.25 surcharge finances waste reduction and recycling programs implemented by the State. $.66 compensates the State for perceived lost benefits from tax credits extended to landfill operators accepting foreign waste. $.72 represents a form of risk premium based upon environmental contingencies which may never occur.

[15] DEQ conceded that the surcharge on foreign waste is not based on actual accounting costs and is not limited to "direct costs" to Oregon, but rather anticipates other related costs. (R. 0052.)

loss of "quiet enjoyment." DEQ's own reasoning is instructive:

> The loss of this "quiet enjoyment" is difficult to quantify * * *. However, some minor loss of "quiet enjoyment" can be expected. The draft EPA report has stated that this loss can be quantified through "political valuation", [sic] underscoring the difficulty of quantifying these impacts.

(R. 0026.) To strike this "political valuation" DEQ conceded the use of traffic accident statistics as a proxy for measuring nuisance. (R. 0896.) Petitioner, however, transports waste into Oregon by barge. Thus, there is entirely no nexus between this "cost" and petitioner's activity.

The infrastructure "cost" of $.03 per ton, moreover, for roadway maintenance, extra rail crossings, and additional traffic patrolling is similarly flawed. Because petitioner transports by barge, it does not significantly contribute to these costs.

Alternately, in regard to contingencies, although DEQ calculated the amount necessary to offset the risk of unfunded environmental liability occasioned by landfills processing foreign waste at $.03 per ton, the State forecasted a $90 million cleanup as though certain to occur, resulting in the $.72 per ton figure selected. (R. 0676-0681.) First, a contingency is not a cost. EQC Chairman Hutchison expressed it best: "It seems like our costs are more actual in these other situations and that it is more of a—we have this contingency issue that we are trying to treat as a cost issue." (R. 0781.) Second, a contingency, by definition, is not a certainty; it is, rather, a possibility. Charging foreign generators in this way is

neither cost recovery nor actuarially sound; it is a worst case scenario impermissibly attributed to interstate commerce.

The impetus for the surcharge on foreign waste emphatically is not cost recovery. On the contrary, it is a volume control device designed to balance lost disposal capacity against foreign revenue receipts. (R. 0213.) To that end, the State selected an optimal figure and rationalized "cost" categories to fit accordingly.[16] (R. 0213.)

b. *If, in Fact, Components of the Surcharge Are Costs Incurred, Why Aren't Oregonians Paying Them as Well?*

This Court has routinely invalidated legislation denying to foreign taxpayers the favorable treatment accorded their domestic counterparts. *See, e.g. New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (tax credit granted exclusively to Ohio Ethynol Producers).[17] More specifically, the State may not exact more than a just share from foreign consumers of Oregon landfill capacity; inversely, it may not exact

[16] At the November 16, 1990, Emergency Board meeting convened to review the proposed surcharge, "Speaker Katz commented that her use of the word 'arbitrary' referred to the difficulty of demonstrating, over time, the relationship between surcharge components and true costs." (Committee Minutes, R. 0954.)

[17] *See also, Tyler Pipe Inds. v. Dept. of Revenue*, 483 U.S. 232 (1987) (Washington multiple activities exemption enjoyed by domestic manufacturers/wholesalers denied to foreign manufacturers wholesaling domestically and domestic manufacturers wholesaling elsewhere); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (exemptions and tax credits for "first use" tax on natural gas conferred on Louisiana consumers withheld from interstate consumers).

less than a just share from Oregonians. *See Washington Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 748 (1978). In short, equal treatment of foreign and domestic waste generators is a condition precedent to the surcharge's validity. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963).

In *Westinghouse*, this Court considered whether a New York tax credit lowering the effective tax rate on gross receipts from a domestic international sales corporation's New York based operations violated the Commerce Clause. In response to the State's claim that taxes collected from interstate commerce were properly apportioned, Justice Blackmun wrote:

> The acceptability of the allocation formula employed by the state of New York is not relevant to the question before us. The fact that New York is attempting to tax only a fairly apportioned percentage of the DISC's accumulated income does not insulate from constitutional challenge the State's method of allowing the DISC export credit. * * * "fairly apportioned" and "nondiscriminatory" are not synonymous terms.

466 U.S. at 399.

Analogously, here, "compensatory" and "nondiscriminatory" are not synonymous terms. The question whether the surcharge on foreign waste compensates the State of Oregon for its costs was not the one begging to be answered by the Oregon Supreme Court; rather, the court should have answered the question whether the State's method of recovering disposal "costs" only from foreign generators of waste impermissibly discriminates against interstate commerce. Although the "costs" identified by the State

are the same regardless of origin[18] (R. 0520), there is a $1.75 gap between the $2.25 surcharge and the $.50 fee assessed on each ton of foreign and domestic waste, respectively. This gap was the subject of criticism from the State's own economist:

> Finally, some of the DEQ identified costs are imposed by waste generators from *all* sources for which the state currently receives no compensation. These categories include: the unfunded liability, the lost disposal capacity, and the other costs category. An efficient resource allocation requires that all consumers pay the full price. Modifying the law to correct the charges to all users would enable the state to set fully efficient disposal fees.

(NERA Evaluation of Out-of-State Waste Surcharge Proposal, prepared by Mark Berkman, R. 0745.) Unmistakably, compared with its treatment of foreign generators, the State has not pursued domestic generators for "costs" with a similar zeal. Why?

Through the $.50 fee assessed on domestic waste, Oregonians neither recompense a nuisance impact for loss of "quiet enjoyment," fund maintenance of infra-

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[18] Mark Berkman, an economist *employed by the state* to review its methodology, commented:

> The DEQ's proposal correctly identifies six cost categories which can be attributed to out-of-state waste which would justify a fee on such waste. Several of these cost categories represent costs imposed on the state *from all waste sources which would justify a fee on all waste disposed in the state regardless of origin.*

(R. 0726) (Emphasis supplied). Berkman further remarked, "[m]any of these costs are not currently charged to instate or out-of-state waste generators." (R. 0744). Following adoption of the surcharge on foreign waste, many of the costs are charged only to foreign waste generators.

structure, pay for lost disposal capacity, nor defray potential environmental liability. *See* ORS 459A.120 (formerly 459.295). Indeed, to the extent any of the surcharge's components are valid costs, the State's method of selective accountability will not do.[19] DEQ justified the advance charge to foreign generators for unfunded environmental liability by noting their capacity to escape the State's taxing clutch should an environmental catastrophe occur. This capacity, however, is not unique to foreign generators. Domestic generators can likewise contribute to that same environmental catastrophe and leave Oregon before the State extracts payment. (R. 0066.) If the State is genuinely concerned about capture, it should collect in advance from Oregonians as well.

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[19] Again, the State's own economic consultant reprehended the State for its failure to collect from foreign and domestic consumers of landfill capacity alike:

Cost Category	Comment
1. Statewide Activities For Reducing Environmental Risk Paid Through Fee	* * *
2. Statewide Activities for Reducing Environmental Risk Paid Through General Fund	* * *
3. Tax Credits and Other Public Subsidies	A cost is incurred only if the costs of the credit exceed the benefits. This cost would be incurred by all waste disposers.
4. Solid Waste Reduction Activities	* * *
5. Unfunded Liability	This cost is also incurred by some in-state waste disposers.

[Continued]

A user fee which seeks full compensation only from foreign consumers of landfill capacity impermissibly shifts the burden of financing the State's solid waste program to interstate commerce. The surcharge on foreign waste, therefore, is the same form of parochial economic protectionism repeatedly stricken by this Court. *See Philadelphia*, 437 U.S. at 626-627.

c. *Even Assuming the State Collects Its "Costs" From Oregonians by Other Means, Its Election of a Consumption Tax on Foreigners Remains Discriminatory.*

A state's method of taxation discriminates where it exerts an "inexorable" pressure on interstate commerce to stay home. *American Trucking*, 483 U.S. at 286-287. The Commerce Clause, accordingly, enjoins any state from manipulating the flow of commerce through taxes. *Nippert v. City of Richmond*, 327 U.S. 416, 425-426 (1946). Conversely, should the commercial flow remain constant despite a discriminatory tax, the Commerce Clause forbids any state from unfairly apportioning income from another. *Armco*, 467 U.S. at 644. Through its chosen fee structure, Oregon secures for itself either preservation of landfill capacity at the expense of foreign consumers or, because it subjects foreign consumers to multiple tax liability, foreign revenue to which it is not entitled, both of which are prohibited.

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[19] [Continued]

6. Lost Disposal Capacity	This cost is also incurred by in-state waste disposers.
7. Other Costs (image, infrastructure, nuisance)	This cost is also incurred by in-state waste disposers.

(R. 0581.)

First, and most patently, Oregon's surcharge on foreign waste will discourage use of the State's landfills by nonresidents. A nonresident's tax is measured exclusively by her consumption of Oregon landfill capacity; an Oregonian's tax, on the other hand, is only nominally linked to consumption. While a nonresident consumer will incur $2.25 of tax liability with each additional ton of space consumed, an Oregonian incurs just $.50—a significantly disparate disincentive to the consumption of landfill capacity. Naturally, the degree to which waste flow is discouraged corresponds directly with its disposal cost; under the differential fee structure, therefore, a nonresident is far more likely to mitigate her waste reduction and consequent consumption of the State's disposal space. Oregon's scheme is an "obvious effort to saddle those outside the State" with the burden of slowing the flow of waste into regional landfills sited in Oregon. *Philadelphia*, 437 U.S. at 629.

The State's method of financing unfunded environmental liability exemplifies the problem. Foreign consumers of Oregon landfill capacity must finance a contingent $90 million cleanup as a precondition to access. Oregonians, though, are assessed no corresponding cost, let alone a similarly transaction sensitive one. The result, of course, is that foreign consumers are more likely than their domestic competitors to search out alternative disposal sites.

Moreover, because the lion's share of foreign waste transported to Oregon is disposed in landfills boasting state of the art environmental protection equipment, foreign consumers are compelled to fund a contingent catastrophic cleanup with no relationship to the risk they create. DEQ determined that an acci-

dent, should one occur, has a 97 percent chance of coming to pass at one of Oregon's 135 unimproved landfills. (R. 0081.) The likelihood of an accident at petitioner's contracted facility, DEQ conceded, is minimal. (R. 0678-0680.) Even assuming Oregonians were called upon to similarly finance unfunded liability, foreign consumers are called upon to subsidize risks for which Oregonians, not they, are responsible. The State heaps a disproportionate burden onto the shoulders of interstate commerce. *See Philadelphia*, 437 U.S. at 629.

If foreign consumers are not dissuaded and choose to use Oregon landfills, the State's scheme of financing its solid waste program will expose them, unlike their domestic competitors, to multiple tax liability. *Armco*, 467 U.S. at 644.[20] For example, a portion of the $.20 per ton allocated to lost disposal capacity contemplates the State's "costs" of siting new facilities. That cost, however, is already assessed on landfill operators through permit fees. (R. 0432.) The same holds true for publicly supported infrastructure—costs associated with highway use are already recovered through PUC weight mile taxes; maintenance of county roads not subject to the weight

[20] Any argument by the State that the surcharge assessed on foreign waste is intended to offset a burden currently born by Oregonians through general income taxes should be extinguished in advance. Such an argument does not consider foreign consumers of Oregon landfill capacity who earn their income in Oregon. These persons will finance the State's solid waste program twice. For example, a citizen of Washington residing in Clark County who works across the border in Portland, Oregon, will pay more than his "fair share" of the State's solid waste program through Oregon state income taxes deducted by his employer and through the $2.25 surcharge on foreign waste.

mile tax is financed through community host fees. (R. 0537; 0441.)

Most blatant of all, though, is the State's attempt to recover $.10 per ton from foreign generators for waste reduction activities *in Oregon*. (R. 0896.) A foreign generator is statutorily compelled to finance waste reduction twice—once to reduce waste in his own sending jurisdiction (mandated by ORS 459.305 as a condition to access) and a second time, through the fee, to help Oregonians reduce their waste as well.[21] The problem was not lost on State Senator Mike Thorne who, as chairman of the joint subcommittee charged with approving EQC's proposed surcharge, remarked:

> I was attempting to focus on the notion that if in fact a producer of waste is already paying for programs which in part we're paying through the general fund, that there ought to be some mechanism to give them credit for that rather than double taxing them * * *. So it was my hope in asking the questions I did, that somehow or another we could distinguish between the $.42 and the $.17 that add up to the $.59 to basically give the producer out-of-state waste credit for those activities which they've been involved in which are directly the same as

[21] DEQ admitted that, to the extent Washington has similar waste reduction programs, Washingtonians will pay the same charge twice. (R. 0898.) DEQ, however, maintained that foreign consumers should pay the same as Oregonians, irrespective of costs. (R. 0650.) DEQ's position does considerable violence to its statutory mandate and to the concept of regional solid waste management. Its view invites the very multiplication of preferential trade barriers the Commerce Clause was conceived to forestall. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

ours that are covered by $.42 that we're paying in the State.

(R. 0923.) Openly, Oregon seeks to unfairly apportion income from interstate commerce to finance its domestic programs. *See Armco*, 467 U.S. at 644.[22]

These are a sampling of the discriminatory effects both patent and latent in the state's surcharge on foreign waste. In its presentation to EQC, DEQ incorrectly stated that the effect of the surcharge is irrelevant. (R. 0047.) The surcharge's effect, on the contrary, is pivotal. The surcharge impermissibly collects as "costs" abstractions and contingencies; "costs" the State seeks to collect only from foreign consumers. In any event, these "costs," even if eventually collected from foreign and domestic consumers alike, are collected in such a fashion as to erect barriers to the free flow of interstate commerce. Those are protectionist effects that engage the State's burden of justification; a burden the State cannot carry.

[22] Accord, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1989) (Montana's severance tax upheld because "the tax burden is born according to the amount of coal consumed and not according to any distinction between instate and out-of-state consumers).

CONCLUSION

Because the surcharge assessed by Oregon on foreign waste discriminates against interstate commerce on its face, in its purpose, and in its effect, thereby passing to the State a burden of justification it cannot carry, petitioner respectfully requests that this Court reverse the decision of the Oregon Supreme Court and strike ORS 459.297, ORS 459.298, OAR 340-97-110 and OAR 340-97-120 as violative of the Commerce Clause of the United States Constitution.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON, RESPONDENTS

COLUMBIA RESOURCE COMPANY, L.P., PETITIONER

v.

ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON, RESPONDENT

On Writ Of Certiorari To
The Supreme Court Of The State of Oregon

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QUESTION PRESENTED

Whether the fact that a state fee is calculated by reference to the costs assertedly incurred by the State in regulating the taxpayer is sufficient — standing alone — to immunize the fee against Commerce Clause scrutiny, even when, as in this case, the fee taxes only interstate commerce and fails the test for discriminatory state exactions set forth in *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992).

II

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Oregon Waste Systems, Inc., states that its parent corporation is Waste Management, Inc., and that Waste Management, Inc.'s parent corporation is WMX Technologies, Inc. Oregon Waste Systems has no subsidiaries.

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RULE 29.1 STATEMENT II

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In the Supreme Court of the United States

OCTOBER TERM, 1993

NO. 93-70

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON, PETITIONERS

V.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON, RESPONDENTS

NO. 93-108

COLUMBIA RESOURCE COMPANY, L.P., PETITIONER

V.

ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON, RESPONDENT

On Writ Of Certiorari To
The Supreme Court Of The State of Oregon

Brief for Petitioners Oregon Waste Systems, Inc.,
and Gilliam County, Oregon

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon (Pet. App. 1a-19a)[1] is reported at 316 Or. 99 and 849 P.2d 500. The opinion of the Oregon Court of Appeals (Pet. App. 20a-44a) is reported at 114 Or. App. 369 and 837 P.2d 965.

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[1] All citations to "Pet. App." refer to the appendix to the petition in No. 93-70.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon (Pet. App. 45a-46a) was entered on June 9, 1993. The petition for a writ of certiorari was filed on July 14, 1993, and was granted on September 28, 1993. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 459.297 and 459.298 of the Oregon Revised Statutes (1991) and the pertinent parts of Oregon Administrative Rules 340-97-110 and 340-97-120 (formerly 340-61-115 and 340-61-120, respectively) are reprinted at pages 47a-49a of the appendix to the certiorari petition.

STATEMENT

In *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992), this Court held invalid under the Commerce Clause an Alabama statute that taxed the disposal of waste generated outside the State but did not tax the disposal of Alabama-generated waste. The law at issue here is indistinguishable from the discriminatory measure declared unconstitutional in that case. Oregon has levied a tax that discriminates expressly — and solely — on the basis of state of origin: disposal of interstate waste is taxed while disposal of Oregon-generated waste is not.

Amazingly, the Oregon Supreme Court held the Oregon tax lawful under the Commerce Clause. The state court concluded that the measure did not have to satisfy the Commerce Clause standard generally applicable to discriminatory taxes and regulations because the tax is calculated by reference to the costs to the State from disposal of the waste. That legal conclusion is plainly incorrect. This Court should close the loophole in the Commerce Clause created by the court below.

A. Background

Disposal of solid waste — a category of waste that generally includes all refuse that is not hazardous[2] — is regulated both by the federal government and by the States. Federal law fixes certain minimum standards for disposal facilities (see, *e.g.*, 42 U.S.C. §§ 6944 & 6945) and requires the preparation of state waste management plans (*id.* §§ 6942, 6943 & 6947), but otherwise leaves to the States the supervision of solid waste disposal.

Oregon comprehensively regulates the disposal of solid waste within the State. For example, a state permit is required in order to operate a solid waste disposal site (Or.

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[2] Under Oregon law,

> "[s]olid waste" means all putrescible and nonputrescible wastes, including but not limited to garbage, rubbish, refuse, ashes, waste paper and cardboard; sewage sludge, septic tank and cesspool pumpings or other sludge; commercial, industrial, demolition and construction wastes; discarded or abandoned vehicles or parts thereof; discarded home and industrial appliances; manure, vegetable or animal solid and semisolid wastes, dead animals, infectious waste * * * and other wastes; but the term does not include:
>
> (a) Hazardous wastes as defined in ORS 466.005.
>
> (b) Materials used for fertilizer or for other productive purposes or which are salvageable as such materials are used on land in agricultural operations and the growing or harvesting of crops and the raising of animals.

Or. Rev. Stat. § 459.005(27) (1991). See also 42 U.S.C. § 6903(27) (substantially similar definition).

Rev. Stat. § 459.205 (1991)); the site must be operated in accordance with the governing laws and regulations and the terms specified in the permit (*ibid.*; *id.* § 459.376); the types of materials that may be disposed of at such a facility are limited by state law (*id.* § 459.247); and when disposal operations are concluded at a site, the owner must close the site and maintain it in accordance with specified standards (*id.* §§ 459.268 & 459.270). These statutory provisions are supplemented by a large body of regulations. See Or. Admin. R. Chapter 340, Divisions 93-97.

Oregon levies a number of different fees in connection with its regulation of solid waste disposal. These include:

- a permit application fee that "shall be based on the anticipated cost of filing and investigating the application, of issuing or denying the requested permit and of an inspection program to determine compliance or noncompliance with the permit" (Or. Rev. Stat. § 459.235(2) (1991)), which ranges from $100 to $10,000 for solid waste disposal (Or. Admin. R. 340-97-120(2));
- an annual fee, for the purpose of implementing the permit compliance program and other statutory requirements, to be "based on the amount of solid waste received at the disposal site in the previous calendar year" (Or. Rev. Stat. § 459.235(3) (1991)), which is fixed at $.21 per ton for landfills (Or. Admin. R. 340-97-120(3));
- an annual fee for the purpose of financing recycling programs, set at $.09 per ton (Or. Admin. R. 340-97-120(4)); and
- an annual fee, to be used for removal or remediation of hazardous substances at certain solid waste disposal sites (Or. Rev. Stat. § 459.236 (1991)), which is set at $.13 per ton (Or. Admin. R. 340-97-120(5)(d)).

The county in which a disposal site is located also may impose a fee, the proceeds of which may be used for a variety of purposes, including mitigation of any adverse effects on the environment. The amount of the fee may be agreed upon between the county and the site operator; in the absence of an agreement, the statute provides for a formula based upon the number of tons of waste disposed of at the site. Or. Rev. Stat. § 459.310 (1991).

This case involves an additional fee on waste disposal levied by the Oregon Legislature in 1989. That provision, entitled "[s]urcharge on solid waste generated out-of-state," is expressly limited to "person[s] who dispose[] of solid waste generated out-of-state." Or. Rev. Stat. § 459.297 (1991). A companion provision directs the Environmental Quality Commission to fix the amount of the fee by regulation on the basis of "the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state" other than costs recovered under various other Oregon laws. *Id.* § 459.298.[3] This fee is "in addition to any other fee charged for disposal of solid waste at the site." *Id.* § 459.297. No Oregon statute requires that an equivalent fee be levied on waste generated within the State.

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[3] The costs "may include but need not be limited to costs incurred for:

(1) Solid waste management;
(2) Issuing new and renewal permits for solid waste disposal sites;
(3) Environmental monitoring;
(4) Ground water monitoring; and
(5) Site closure and post-closure activities."

Or. Rev. Stat. § 459.298 (1991).

Following the enactment of the statute, the Environmental Quality Commission instituted an administrative proceeding to fix the amount of the fee on disposal of out-of-state waste. It established $2.25 per ton as the additional fee for waste generated out-of-state. Or. Admin. R. 340-97-120(7) (formerly 340-61-120(6)).[4]

At the same time that it enacted the additional fee on disposal of out-of-state waste, the Oregon Legislature levied an additional fee on disposal of solid waste generated within the State to raise revenues to support environmental protection programs, solid waste planning, and recycling. See 1989 Or. Laws 833, §§ 152 & 153. The fee on Oregon waste, however, was capped at $.50 per ton (later increased to $.85 per ton). Or. Rev. Stat. §§ 459A.110(5) & 459A.115 (1991). The latter amount is 36% of the additional $2.25 per ton imposed on disposal of non-Oregon waste.[5]

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[4] The Commission initially adopted a fee of $2.75 per ton, but that regulation was disapproved by the state Emergency Board. See Or. Rev. Stat. § 459.298 (1991) (requiring Emergency Board approval during the interim between sessions of the rule promulgated by the Commission).

[5] Apparently concerned that the invalidation by the courts of the $2.25 per ton fee would create a situation in which only Oregon waste was subject to an additional levy, the Oregon Legislature in 1991 amended the statute to subject out-of-state waste to the same $.85 per ton charge as Oregon waste. See Or. Rev. Stat. § 459A.110(6) (1991) (as amended by 1991 Or. Laws 385, § 13a). (This fee was added to the $2.25 fee, which was left in place by the Legislature.) If the $2.25 per ton fee ultimately is upheld by the courts, however, the $.85 per ton fee would again be limited to Oregon waste. 1991 Or. Laws 385, §§ 91 & 92. Thus, the ultimate result would be the same as under the original 1989 law — the surcharge for Oregon waste would be $.85 per ton, while the surcharge for out-of-state waste would be $2.25 per ton.

B. The Decisions Below

Petitioner Oregon Waste Systems, Inc. ("OWS") owns and operates a solid waste landfill southwest of the City of Arlington in Gilliam County, Oregon. Both solid waste generated within Oregon and solid waste generated outside the State are disposed of at this landfill. Petitioner Gilliam County receives direct and indirect benefits from the operation of the landfill, both in terms of employment of county residents and the payment to the county of local fees and taxes.

Following the Environmental Quality Commission's issuance of the rule fixing the disposal fee at $2.25 per ton, petitioners sought judicial review of the rule in the Oregon Court of Appeals. See Or. Rev. Stat. § 183.400 (1991) (providing for judicial review of administrative rules). Petitioners challenged the rule under state law and also on the ground that the rule violated the Commerce Clause of the United States Constitution.

The state court of appeals rejected the constitutional challenge. Pet. App. 43a-44a. The court characterized the Oregon exaction as a "compensatory fee" (*id.* at 39a) because it is "based on and applied to the provision of a narrow range of state services that are directly connected to the activity on which the fees are imposed" (*id.* at 41a n.19). Cautioning that cases addressing Commerce Clause challenges to "discriminatory health and general welfare laws and general revenue measures" did not provide the controlling standard (*id.* at 40a n.19), the court stated that such a fee is invalid under the Commerce Clause only if it "is excessive for the purpose for which it is collected" or if "'there is no sufficient relation between the measure employed and the extent or manner of use' of the state provided service" (*id.* at 40a (citation omitted)). The court concluded that OWS had failed to establish that the fee on disposal of out-of-state waste was

either excessive or unrelated to the state provided services (*id.* at 44a), and accordingly upheld the fee.[6]

The state supreme court affirmed. Pet. App. 1a-19a. It stated that "[b]ecause of the express nexus to actual costs incurred, * * * [the fee on out-of-state waste] does not, on its face, constitute discrimination against an article of commerce, the origin of which is outside the state." *Id.* at 17a. The court further stated that the fee "constitutes a 'compensatory' fee for specific costs incurred by the state in the regulation of [out-of-state] waste. A law imposing a compensatory fee for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce is *prima facie* reasonable." *Id.* at 18a (citations omitted). The sole inquiry under the Commerce Clause, the court said, is whether the amount of the fee is "'manifestly disproportionate to the services rendered.'" *Ibid.* (quoting *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)).

SUMMARY OF ARGUMENT

Less than eighteen months ago, this Court invalidated Alabama's discriminatory fee on disposal of waste generated outside the State. *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992). The Oregon fee at issue here is essentially indistinguishable from the measure struck down in *Chemical Waste Management*. The Alabama statute taxed disposal of interstate waste but not disposal of intrastate waste; the Oregon measure is drawn in precisely the same

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[6] The court observed that the statute governing the judicial review proceeding provided that the reviewing court could examine only the rule under review, the statutory provisions authorizing the rule, and certain rulemaking documents. Pet. App. 44a (quoting Or. Rev. Stat. § 183.400(3)). The court stated that "[a] facial review of the enabling legislation and the rules does not show that the fees are either excessive or unrelated to the state provided service." Pet. App. 44a.

manner. Alabama's discriminatory tax was not tied to any differences in the health, safety or financial burdens imposed upon the State by intrastate and interstate waste; the Oregon statute by its terms directs the State to tax only interstate waste even though the costs that Oregon seeks to recover are triggered by the disposal of intrastate waste as well.

In fact, there is only one difference between the two measures — the Oregon fee purports to be cost justified while the Alabama tax did not. The Oregon Supreme Court imbued that difference with tremendous constitutional significance, holding that cost-based exactions may be upheld under the Commerce Clause even when they violate the anti-discrimination principle applicable to other types of state revenue measures. That holding is clearly wrong.

This Court has repeatedly reaffirmed that a cost-based fee will pass constitutional muster only if it is not "discriminatory against interstate commerce." *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716 (1972). Indeed, nearly 100 years ago the Court expressly rejected the argument that state fees set by reference to costs may discriminate against interstate commerce. *Guy* v. *City of Baltimore*, 100 U.S. 434 (1880).

Moreover, once the proper constitutional standard is applied, there can be no doubt that, far from qualifying as nondiscriminatory as the court below indicated, the Oregon fee discriminates against interstate commerce in violation of the Commerce Clause. The fee certainly serves a legitimate state purpose — cost recovery — but as this Court has recognized in numerous decisions, most recently in *Chemical Waste Management*, a legitimate purpose is not by itself sufficient to justify discrimination. The State must establish that its purpose could not be achieved by nondiscriminatory means.

Here, where Oregon seeks to recover costs that are associated with disposal of all waste, regardless of origin,

there clearly is a nondiscriminatory alternative: "a generally applicable per-ton additional fee on *all* * * * waste disposed of within [Oregon]." *Chemical Waste Management*, 112 S. Ct. at 2015 (emphasis in original). Oregon's decision to choose the *most* discriminatory alternative clearly violates the Commerce Clause.

ARGUMENT

OREGON'S $2.25 PER-TON FEE ON DISPOSAL OF OUT-OF-STATE WASTE VIOLATES THE COMMERCE CLAUSE

The Oregon Supreme Court's principal justification for upholding the State's tax on disposal of out-of-state waste was its conclusion that all cost-based fees are *per se* constitutional under the Commerce Clause, without regard to whether the fee discriminates against interstate commerce. The state court also indicated that a cost-based fee is properly classified as nondiscriminatory, and therefore valid under the Commerce Clause, because the amount of the fee is fixed by reference to a factor other than the waste's state of origin. Both of these rationales are fundamentally flawed. Cost-based fees — like any other state exaction — are lawful only if they are nondiscriminatory. And this Court's decision in *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992), establishes beyond any doubt the plainly discriminatory nature, and patent unconstitutionality, of the Oregon fee.

A. The Commerce Clause Prohibits All State Exactions That Discriminate Against Interstate Commerce, Including Fees That Purport To Be Cost Justified.

1. This Court's Decisions Make Clear That A Cost-Justified Fee Is Unconstitutional If It Discriminates Against Interstate Commerce.

The Court repeatedly has affirmed that "'a State may not tax a transaction or incident more heavily when it crosses

state lines than when it occurs entirely within the State.' Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2014 (1992) (quoting *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984)) (citations omitted). This principle has been applied most often to state regulations and state taxes designed to raise revenues for general purposes. But this Court's decisions leave no doubt that the same rule applies to all types of state financial exactions, including user fees charged by the State for the use of state-provided facilities or services.[7]

Indeed, the Court applied this very principle over 100 years ago to invalidate a discriminatory state exaction. *Guy* v. *City of Baltimore*, 100 U.S. 434 (1880), was a challenge to a city ordinance that imposed wharfage fees for unloading non-Maryland merchandise on the city's public wharves; Maryland goods were exempt from the fees. The city argued that "those operating vessels, laden with the products of other States, cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the city's property." 100 U.S. at 441. Declaring that proposition "unsound both upon

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[7] The Court has described "user fees" or "user taxes" as those exactions "designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 621 (1981). The Oregon fee does not fit this model precisely, because the "costs" that the state seeks to recover are incurred in connection with regulatory oversight, not as a result of the taxpayer's use of state facilities. (In addition, as we discuss below (at 28-29), some elements of the fee are not even costs at all.) But even assuming that the Oregon tax qualifies as a user fee, it violates the Commerce Clause because it discriminates against interstate commerce.

principle and authority," this Court held that the fees violated the Commerce Clause because they imposed a discriminatory burden on interstate commerce. *Id.* at 442-443.

The Court has continued to adhere to the view that user fees are unconstitutional if they discriminate against interstate commerce. In *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Court considered a Commerce Clause challenge to a $1 per person "use and service charge" for passengers enplaning from the Evansville airport; the fee was designed to recover the costs to the Authority of constructing and maintaining the airport (405 U.S. at 709). The Court held that "so long as the [user fee] is based on some fair approximation of use or privilege for use [of governmental resources] * * * *and is neither discriminatory against interstate commerce* nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster." *Id.* at 716-717 (emphasis added).

The Court in that case first inquired whether the fee "discriminate[d] against interstate commerce and travel." *Id.* at 717. Observing that "both interstate and intrastate flights are subject to the same charges," and that there was "no showing of any inherent difference between these two classes of flights, such that the application of the same fee to both would amount to discrimination against one or the other," the Court held the fee nondiscriminatory. *Ibid.*[8]

More recently, in *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), the Court reaffirmed that user fees are valid under the Commerce Clause only if they are

[8] The Court then went on to apply the other parts of the test, examining whether the charge "reflect[s] a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed" (405 U.S. at 717) and whether the charge was "excessive in relation to costs incurred by the taxing authorities" (*id.* at 719).

both nondiscriminatory *and* represent a fair approximation of the use of the government facilities or services. 483 U.S. at 289-290. Pennsylvania argued in that case that the marker fee and axle tax there at issue could be upheld as constitutionally-permissible user fees. The Court squarely rejected that argument on the ground that the fees "discriminate[d] against out-of-state vehicles." *Id.* at 290. Cf. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 261-262 (1974) (government may not require nonresident indigent individuals to bear costs of hospitalization while providing free services to residents); *Toomer* v. *Witsell*, 334 U.S. 385, 402-403 (1948) (Privileges and Immunities Clause prohibits State from charging discriminatory license fee to nonresidents).

Under this Court's cases, therefore, the threshold inquiry in evaluating the validity under the Commerce Clause of a cost-justified fee is the same as the test that applies to any other state regulation or financial exaction: whether the measure discriminates impermissibly against interstate commerce.

The Oregon Supreme Court concluded in the present case that a State is free to "impos[e] a compensatory fee for costs incurred * * * in supervising and regulating the activities of an entity engaged in interstate commerce" while exempting entities engaged in intrastate commerce from paying the cost of precisely the same supervisory and regulatory activities. Pet. App. 18a. In the Oregon court's view, the existence of discrimination against interstate commerce is irrelevant. All that need be considered to determine the validity of a user fee under the Commerce Clause is whether the amount of the fee is "'manifestly disproportionate to the services rendered.'" *Ibid.* (quoting *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)).

As we have discussed, however, there simply is no support in this Court's decisions for the startling proposition

that undergirds the decision below — that once a court determines that the state levy at issue is a user fee, the anti-discrimination element of the Commerce Clause is no longer in issue and the fee will pass muster under the Commerce Clause regardless of the extent of the discriminatory burden imposed upon interstate commerce. Far from holding that a user fee should not be scrutinized to determine whether it discriminates against interstate commerce, this Court's decisions expressly state that such fees must be examined on an individual basis to determine whether they comport with the anti-discrimination obligation imposed by the Commerce Clause. Accord *Government Suppliers Consolidating Services, Inc.* v. *Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992), cert. denied, 113 S. Ct. 977 (1993) (holding that this Court's decisions forbid cost-based fees that discriminate against interstate commerce).[9]

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[9] None of the cases relied upon by the Oregon Supreme Court hold that a user fee may pass muster under the Commerce Clause even if it discriminates against interstate commerce. The statute at issue in *Clark* v. *Paul Gray, Inc.*, *supra*, required individuals to obtain a license, and pay a license fee, in order to transport motor vehicles for the purpose of offering them for sale. The statute exempted some, but not all, intrastate transportation from the license requirement. The Court considered and rejected the claim that the statute discriminated against interstate commerce, holding that the taxpayer lacked standing to challenge one of the exemptions (306 U.S. at 596) and that the other exemption involved transportation that differed in character — and therefore in the burden imposed on state resources — from the transportation that was subject to the fee (*id.* at 596-598). By evaluating the claim of unjustified discrimination on the merits, and rejecting it only because the statutory classification was justified by a factor other than the in-state destination of the exempt traffic, *Clark* makes clear that user fees may be upheld only if they are *non*discriminatory.

In *Great Northern Ry.* v. *Washington*, 300 U.S. 154 (1937), there was no claim of discrimination. The statute in question levied an identical fee on all public utilities, those engaged in intrastate commerce and those engaged in interstate commerce; the Court held that the State failed to carry its burden of showing that the fees did not exceed what was reasonably necessary to cover the cost of its regulatory and supervisory activities (300 U.S. at 168). See also *Ingels* v. *Morf*, 300 U.S. 290 (1937) (fee struck down on ground it lacked reasonable relation to costs of regulation; Court did not reach discrimination claim). Finally, *Commonwealth Edison Co.* v. *Montana*, *supra*, involved a general revenue tax, not a user fee, and the Court expressly "put to one side" its decisions addressing user fees. 453 U.S. at 621. Moreover, the Court upheld the tax in that case because it did *not* discriminate against interstate commerce.

2. Nothing In The Purposes Of The Commerce Clause Justifies Applying A Truncated Constitutional Analysis To State User Fees.

The Oregon court provided no reason why user fees — unlike every other form of governmental charge and regulation — should be exempt from the fundamental anti-discrimination principle embodied in the Commerce Clause. In fact, the purposes underlying the Commerce Clause weigh strongly against the user fee exception created by the court below.

To begin with, the fact that a tax is calibrated by reference to costs assertedly incurred by a State does not by itself guarantee that the exaction will be nondiscriminatory. Here, for example, the fee is levied *only* on interstate commerce despite the fact that intrastate commerce subjects the state to virtually all of the same costs — a blatant example of discrimination. See pages 20, 27-28, *infra*.

Moreover, discriminatory user fees would impose the same barriers against interstate trade as other types of discriminatory measures, and can fuel the very sort of commercial rivalries among the States that the Commerce Clause was designed to prevent. See *McLeod* v. *J.E.*

Dilworth Co., 322 U.S. 327, 330 (1944) (the "very purpose" of the Commerce Clause was to establish "an area of free trade" among the States by forbidding discriminatory treatment of each other's products and trade); *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979). The legal regime created by the court below would allow exactions that closely approximate import tariffs. For example, highway tolls could be assessed only on interstate commerce. A State that required inspection of meat and produce before it could be sold could impose the full cost of inspection on out-of-state goods while levying no fee at all for performing the same inspections of in-state products. These are precisely the types of divisive exactions — pitting products of one State against those of another — that the Commerce Clause was intended to prevent.

Permitting such a significant difference in the Commerce Clause standards applicable to general taxes and user fees also would give States a tremendous incentive to characterize as many exactions as possible as "user fees" in order to avoid the prohibition against discriminatory measures. This Court has long recognized that States have an inherent incentive to shift costs to out-of-state taxpayers. See, *e.g.*, *Nippert* v. *City of Richmond*, 327 U.S. 416, 434-435 (1946) (in invalidating a discriminatory tax, the Court observed that "[p]rovincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation"). Although the political process does provide a check against disproportionate *nondiscriminatory* fees, because such fees are borne by intrastate as well as interstate commerce, the political process provides little or no protection against disproportionate *discriminatory* fees because the parties burdened by such fees are not represented. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940) ("to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally

exerted on legislation where it affects adversely interests within the state").

States could seek to recover extremely amorphous "costs" allegedly inflicted by interstate commerce without imposing the same burden on intrastate commerce. These could range from compensation for risks of harm to persons or the environment posed by out-of-state goods (potentially burdening everything from hazardous chemicals used in manufacturing, to guns and ammunition, to kitchen knives); to imposing on particular out-of-state goods a pro rata share of police, fire, and other state services; to requiring compensation for damage to a state's image from the presence of unpopular out-of-state products. Courts would be able to invalidate a fee limited to interstate commerce only if the fee was manifestly disproportionate to the State's costs, a test that leaves considerable leeway for the imposition of heavy — and disproportionate — burdens on interstate commerce.

There simply is no reason to create two different tiers of Commerce Clause protection, with all the possibilities of subtle (and not-so-subtle) evasion of the anti-discrimination principle. Any type of state enactment that expressly discriminates against interstate commerce — be it a regulation, tax, or user fee — must satisfy the *Chemical Waste Management* standard in order to pass muster under the Commerce Clause.[10]

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[10] Indeed, rather than holding that user fees are subject to more relaxed Commerce Clause review, as the court below stated, this Court has subjected such fees to more searching review in one respect — "[b]ecause such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, [the Court] ha[s] required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered.'" *Commonwealth Edison*, 453 U.S. at 622 n.12 (citation omitted). The burden imposed upon taxpayers by general revenue taxes is

B. The Oregon Fee Is Unconstitutional On Its Face.

The test for determining whether a state exaction is unconstitutionally discriminatory was set out by this Court in *Chemical Waste Management* — if the state law "discriminates both on its face and in practical effect [against interstate commerce], the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Chemical Waste Management*, 112 S. Ct. at 2014 (quoting *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)).

The Oregon Supreme Court did not undertake that inquiry. It observed that a user fee's "express nexus to actual costs incurred" provides a "discernible basis" for the fee separate from the out-of-state origin of the waste (Pet. App. 17a). But the fact that a user fee may serve a legitimate public purpose — cost recovery — falls far short of establishing that a discriminatory user fee satisfies the stringent Commerce Clause standard prescribed by this Court in *Chemical Waste Management*. See 112 S. Ct. at 2013 (listing cases in which "'a presumably legitimate goal was sought to be achieved by the illegitimate means'" of imposing a discriminatory burden on interstate commerce). The State must not only demonstrate a legitimate purpose but also must establish that the purpose could not be achieved by a less discriminatory means. In virtually every user fee case there will be other, nondiscriminatory means by which the State may accomplish its purpose of cost recovery, such as an across-the-board fee on both intrastate and interstate commerce.

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subject to much less searching judicial scrutiny. *Id.* at 625-629.

Had it applied the proper test, the Oregon Supreme Court would have invalidated the Oregon fee on the ground that the discriminatory exaction clearly violates the Commerce Clause's anti-discrimination principle.

1. The Oregon Fee Is Invalid Under The *Chemical Waste Management* Test.

The Oregon regulation, and the underlying statutory provisions, are constitutionally indistinguishable from the Alabama tax held unconstitutional by this Court in *Chemical Waste Management*. The Alabama law imposed a disposal tax only on interstate waste disposed of within the State. This Court held that Alabama bore the burden of justifying the discriminatory tax "'both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" 112 S. Ct. at 2014 (citation omitted).

Alabama could not carry that burden. The Court found that Alabama failed to show that the tax on interstate waste was justified by higher costs or environmental risks associated with the disposal of that waste. Because these factors did not vary with the origin of the waste, but were the same for each ton of waste regardless of origin, the State could not single out interstate waste for a higher tax burden. 112 S. Ct. at 2014-2016. Less discriminatory alternatives were available, "not the least of which [is] a generally applicable per-ton additional fee on *all* hazardous waste disposed of within Alabama." *Id.* at 2015 (emphasis in original).

The Oregon regulation suffers from the same flaw. Interstate waste alone is targeted for an additional exaction, but — as was the case with the Alabama statute — neither the Oregon law nor the regulation links that additional burden to any unique characteristic of interstate waste, such as a higher per-ton cost to the State as compared to Oregon waste. Rather, the statute's very terms establish that the categories of costs that the State seeks to recover through the fee are the

kinds of costs that result from the disposal of all types of waste. See Or. Rev. Stat. § 459.298 (1991) (referring to costs incurred for solid waste management, issuing permits for disposal sites, environmental and ground water monitoring, and site closure activities). The State admitted as much in its brief below. Or. Sup. Ct. Br. 24-25.

Thus, each ton of interstate waste is assessed a fee calculated to reimburse the State for the entire cost of regulating disposal of that waste, but intrastate waste is exempt from that burden and instead is assessed a fee representing a significantly smaller share of the State's costs. (The additional fee applicable to Oregon waste is only 36% of the amount applicable to interstate waste. See page 6, *supra*.) The regulation subjects interstate commerce to a burden from which intrastate commerce is exempt: compensating the State for *all* of the costs associated with waste disposal.

As with the Alabama tax, such blatant discrimination violates the Commerce Clause. The face of the statute makes clear that the purpose of the fee is to recover the costs associated with regulating waste disposal. Yet Oregon has not pointed to any reason why it cannot recover all of its costs of regulation through a nondiscriminatory per-ton fee on all waste disposed of within the State. (Indeed, Oregon already uses nondiscriminatory fees to recover a wide variety of costs associated with its regulation of waste disposal. See pages 4-5, *supra*.) Because there plainly are less discriminatory means by which Oregon may accomplish its purpose, the fee on interstate waste violates the Commerce Clause.

2. Separate Proof Of "Economic Protectionism" Is Not Necessary To Establish The Fee's Discriminatory Character.

Oregon argued in the court below that the fee's facial discrimination against interstate commerce was not by itself

sufficient to establish the measure's unconstitutionality because "protectionist laws and *only* protectionist laws discriminate against interstate commerce. * * * A statute that does not provide an advantage to local interests at the expense of out-of-state interests does not discriminate against interstate commerce." Or. Sup. Ct. Br. 13 (emphasis in original). According to the State, proof that a state law imposes a discriminatory burden on interstate commerce is not sufficient to trigger the State's burden under the *Chemical Waste Management* standard to demonstrate that the law serves a state interest that could not be furthered through nondiscriminatory means. Rather, the record must demonstrate the actual competitive impact of the discriminatory burden. Oregon completely misapprehends the governing legal standard.

This Court has observed many times that the purpose of the Commerce Clause is to combat economic protectionism. But the Court has never held that proof of actual competitive injury is the only way to establish the invalidity of a particular state enactment under the Commerce Clause. Rather, the Court has recognized that the Commerce Clause is implicated by the imposition of a disproportionate economic burden on interstate commerce together with the State's inability to show that the measure is the least discriminatory means of effectuating the underlying state policy. *Chemical Waste Management*, 112 S. Ct. at 2015 n.6 ("[t]he 'virtually *per se* rule of invalidity' applies 'not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade'") (citations omitted).

In *Chemical Waste Management*, for example, the Court observed that the Alabama statute discriminated on its face against interstate commerce because it was "imposed on interstate commerce alone." 112 S. Ct. at 2014. "Because the [Alabama tax] discriminates," the State bore the burden

of showing the absence of nondiscriminatory alternatives. *Ibid.* The Court did not condition that legal conclusion upon proof that Alabama waste generators obtained an economic advantage over their counterparts in other states. Indeed, it did not even discuss that question. See also *id.* at 2015 n.6 (""'[a] finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose or discriminatory effect'") (citations omitted).

That approach is supported by simple common sense. Imposition of a disproportionate financial burden on interstate commerce necessarily disadvantages interstate commerce vis-a-vis intrastate commerce. See *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 48 (1990) (discriminatory tax injured the taxpayer engaged in interstate commerce "not only because it left [the taxpayer] poorer in an absolute sense than before * * *, but also because it placed [the taxpayer] at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products"); *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 275 (1988). Unless the discrimination is justified by some reason other than state of origin, it plainly runs afoul of the purpose of the Commerce Clause — to ensure the free flow of interstate trade.

Even if such an analysis were necessary, moreover, the economic advantage afforded to Oregon waste generators (as compared to their out-of-state counterparts) is apparent from the face of the fee and its authorizing statute. Those entities do not have to absorb a cost that out-of-state waste generators *do* have to absorb. That, in turn, means that in-state generators will have an economic advantage in competing for Oregon waste disposal capacity. That economic advantage stems solely from the in-state origin of the waste and is therefore anathema to the Commerce Clause.

3. Oregon Cannot Justify The Discriminatory Fee On The Ground That Intrastate Commerce Pays Its "Fair Share" Of The Relevant Costs Through General Revenue Measures.

Oregon argued below that the fee on disposal out-of-state waste is not discriminatory because intrastate commerce pays its "fair share" of the same costs "through a combination of fees and general fund taxation" (Or. Sup. Ct. Br. 14 (footnote omitted)). That argument is squarely foreclosed by this Court's Commerce Clause jurisprudence.

The Court has recognized that in some situations a tax limited to interstate commerce may "compensate" for an exaction imposed solely on intrastate commerce and therefore may pass muster as nondiscriminatory. The Court has carefully delineated the boundaries of this "compensatory tax doctrine," however, in order to avoid undermining the Commerce Clause's prohibition against discrimination. A tax restricted to interstate commerce accordingly must satisfy two clear requirements before it may be upheld on this ground: the levy on interstate commerce must be equal to the parallel levy on intrastate commerce, and the two taxes must be applied to "substantially equivalent event[s]." *Maryland* v. *Louisiana*, 451 U.S. 725, 759 (1981); see also *Tyler Pipe Industries* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 244 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. at 642-643.

Oregon did not even attempt to show that the fee met this test (see Or. Sup. Ct. Br. 14, 21). Nor could it. The State cannot point to a $2.25 per ton fee imposed on disposal of Oregon waste; that fee is only $0.85 per ton (see page 6, *supra*). And to the extent the State relies on other types of taxes to make up the difference, those exactions plainly are not imposed on events that are "substantially equivalent" to waste disposal.

Oregon instead argues for the creation of a "short cut" to avoid the restrictions on the compensatory tax doctrine. In Oregon's view, a fee on interstate commerce should be upheld as long as intrastate commerce somehow bears the same financial burden as interstate commerce — here, a "fair share" of the costs of waste disposal. Because the costs to the State of disposing of Oregon waste are funded out of general revenues, the argument goes, intrastate waste does bear an equal burden and the fee on disposal of interstate waste is effectively nondiscriminatory.

This argument is virtually identical to one rejected by the Court in *American Trucking Ass'ns, Inc.* v. *Scheiner*, *supra*. There, the State of Pennsylvania sought to justify taxes that imposed a disproportionate burden on out-of-state truckers by arguing that Pennsylvania truckers actually paid a higher rate if registration fees and other fees and taxes on Pennsylvania truckers were considered in the aggregate. The Court squarely rejected this argument:

> [E]ven if the relative amounts of the States' registration fees confer a competitive advantage on trucks based in other States, the Commerce Clause does not permit compensatory measures for the disparities that result from each State's choice of tax levels. To the extent that a competitive disadvantage is conferred on Pennsylvania carriers by the relative amounts of the States' registration fees, the remedy lies in a change in their level, * * * or the collection of revenues through valid taxes. * * * As one commentator has observed, "[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens."

483 U.S. at 288-289 (citation omitted).

Oregon's attempt to justify the fee on interstate waste by pointing to other types of financial burdens imposed on intrastate commerce is foreclosed by *Scheiner*. Just as Pennsylvania could not agglomerate taxes and fees on intrastate commerce in an attempt to show that Pennsylvania truckers actually bore the same or a greater economic burden than out-of-state truckers, Oregon cannot generally invoke taxes paid by intrastate commerce in order to balance the fee on interstate waste.

But even on its own terms, Oregon's argument is indefensible. To begin with, the general revenue funds that assertedly cover the "costs" of disposing of intrastate waste are produced by a variety of levies, including personal income taxes, corporate excise and income taxes, and taxes on particular products such as liquor and cigarettes. See Or. Rev. Stat. tit. 29. These taxes obviously are not paid exclusively by Oregon waste generators; they are paid by a much larger — and entirely different — group of taxpayers. The Commerce Clause does not recognize two competing monoliths — "all interstate commerce" and "all intrastate commerce" and mandate equality between the sums of all of the tax burdens on the two. The critical question under the Commerce Clause is whether the State has imposed an economic burden on a particular segment of interstate commerce that is heavier than the burden on the parallel segment of intrastate commerce. Oregon's apparent view that intrastate commerce is one indivisible entity rests on the precise logic that the Commerce Clause rejects: that the State is an independent economic entity with all intrastate commerce treated as separate and apart from interstate commerce.

Moreover, the taxes on which Oregon relies do not even fall exclusively on intrastate commerce. For example, one source of these funds — the State's corporate excise and corporate income taxes (see Or. Rev. Stat. ch. 317 & 318) — apply equally to revenues generated by both intrastate and interstate transactions. Innumerable interstate transactions are

therefore burdened by these levies. Particularly significant is the fact that landfill operators such as Oregon Waste Systems must pay taxes on receipts from interstate transactions even though those transactions are also subject to the $2.25 per ton fee. And out-of-state waste generators must pay the same taxes with respect to income earned in Oregon even though their disposal costs will reflect the out-of-state fee.

Oregon's "fair share" argument is thus a mirage. Because the costs of disposal of intrastate waste are not covered by taxes paid solely by intrastate commerce — but instead are covered by taxes paid by *both* intrastate *and* interstate commerce — the result of Oregon's approach would be that interstate commerce would pay not just its own way, but some portion of intrastate commerce's way as well. Rather than establishing the nondiscriminatory nature of the fee, Oregon's argument merely provides yet another reason why the fee is discriminatory.

C. The Record Confirms The Unconstitutionality Of The Fee.

In our view, the unconstitutionality of the Oregon fee is plain from the face of the regulation and authorizing statute. There accordingly is no need to refer to the record in this case. To the extent the Court concludes otherwise, it is of course free to examine the record. The state procedural rules that barred the Oregon Supreme Court from doing so (see Pet. App. 5a n.2) do not bind this Court. And the record confirms the discriminatory nature of the fee.[11]

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[11] If the Court were to conclude that examination of the record is necessary to adjudicate the Commerce Clause discrimination claim but did not wish to undertake that review in the first instance, the Court could reverse the judgment of the Supreme Court of Oregon and remand the case with instructions that no disposition be made with respect to the discrimination claim, the course that the lower court followed with respect to the Commerce Clause excessiveness claim. See Pet. App. 11a. The discrimination issue could then be litigated in a subsequent proceeding not hedged with the procedural restrictions that bound the Oregon courts in this case.

The components of the $2.25 per ton fee are as follows:

$/ton	Basis for cost
$0.58	Statewide activities for reducing environmental risk and improving solid waste management.
$0.66	Reimbursement to the state for tax credits and other public subsidies for Oregon landfills.
$0.05	Solid waste reduction activities related to the review and certification of out-of-state communities' waste reduction and recycling plans.
$0.72	Increased environmental liability.
$0.20	Lost disposal capacity.
$0.03	Publicly supported infrastructure.
$0.01	Nuisance impacts from transportation.

R. 938-951 (hearing transcript).

To begin with, virtually *all* of these costs — to the extent they are costs at all — are triggered by the disposal of any ton of waste regardless of its origin; essentially no costs are unique to disposal of out-of-state waste.[12] The State's own

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[12] Even the $0.05 per ton for review of the recycling programs of out-of-state communities that ship waste to Oregon simply parallels the cost of the state-mandated review of the recycling programs of Oregon communities whose waste is disposed of

calculations establish that fact: in each case, the costs were calculated on a per ton basis without distinguishing between Oregon and interstate waste. The resulting per ton cost was then assigned to interstate waste. R. 665-690 (DEQ analysis). The State's economic consultant expressly recognized that the costs in question were common to all waste. R. 731-732, 744. There is no record evidence to the contrary.

Thus, the discriminatory fee cannot be defended on the ground that it recovers costs unique to interstate waste. Oregon instead has determined that interstate waste should be charged for costs that are common to both interstate and Oregon waste. That is the precise ground on which the Court held the Alabama tax at issue in *Chemical Waste Management* violative of the Commerce Clause. See 112 S. Ct. at 2015-2016 (observing that the health, environmental and financial risks advanced to justify the discriminatory fee "do not vary with the waste's State of origin in a way allowing foreign, but not local, waste to be burdened") (footnote omitted).

Second, the record establishes beyond any doubt that — contrary to Oregon's assertion — a large chunk of these costs is imposed only on interstate commerce; it is *not* borne by intrastate commerce through the State's general revenue measures. For example, nearly one-third of the fee, $0.72 per ton, allegedly covers possible environmental liability that the State might bear in the future in the event of a release of waste from a landfill. To the extent that risk of future liability is even a "cost" — given that the State has no current financial burden, may never have to pay anything at all, and is not required to save these revenues for use in the event they are needed[13] — it is a cost that intrastate

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outside of the county of origin. Or. Rev. Stat. § 459.305 (1991).

[13] Under federal law, the landfill operator and waste generators are responsible for these costs in the first instance. 42 U.S.C. § 9607. The State must pay only in the extremely unlikely event that all of these sources of funds were unavailable.

commerce does not bear either directly (through a fee) or indirectly (through other revenue measures) because the State does not allocate any portion of its general revenues to cover this "cost." R. 745 (report of State's economic expert). Similarly, the $0.20 per ton charge for lost disposal capacity is neither directly nor indirectly imposed on Oregon waste. *Ibid.*

The fact that more than one-third of the fee ($0.92 per ton) subjects interstate waste to costs that are not imposed in any manner on Oregon waste establishes beyond any doubt the unconstitutionality of this measure. The Oregon tax is in this regard identical to the Alabama tax invalidated in *Chemical Waste Management* because Oregon has not — and cannot — explain why it "targets *only* interstate * * * waste" (112 S. Ct. at 2014 (emphasis in original)) to meet its goal of cost recovery when Oregon waste imposes the same costs upon the State but is not required to pay for them.[14]

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[14] Oregon may argue that it is entitled to limit these charges to interstate waste. The State's justification for the charge for lost disposal capacity, for example, is that "[e]very ton of solid waste accepted from out-of-state uses disposal capacity which cannot be used for Oregon waste, and which therefore must ultimately be replaced." R. 681. But the assumption underlying that contention is that Oregon waste has some superior entitlement to Oregon disposal capacity and that interstate waste must therefore pay "compensation" for displacing Oregon waste. This Court squarely rejected that premise in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978), holding that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders."

The charge for potential environmental liability apparently rests on the assumption that out-of-state generators will not be available to pay for any cleanup costs the State might incur. But federal law makes out-of-state generators liable to the same extent

Third, 10 cents of the $0.58 charge for statewide waste reduction activities is designed to recover costs associated with programs to reduce waste generation *by Oregon generators*. R. 896 (statement of DEQ official). That plainly is not a cost imposed upon Oregon by the disposal of interstate waste.

Finally, more than one-quarter of the fee, $0.66 per ton, is designed to recapture state tax credits or other subsidies relating to transportation or disposal of solid waste such as, for example, credits for the cost of pollution control measures installed in constructing a landfill. Because Oregon waste is not subject to this charge, these credits and subsidies remain undisturbed to the extent that a landfill disposes of Oregon waste. If the landfill is used for disposal of interstate waste, however, these credits are proportionately reduced.

Imposition of that "recapture" charge constitutes an independent violation of the Commerce Clause. In *New Energy Co.*, this Court held that Ohio could not grant a tax credit for sales of Ohio-produced ethanol, but deny a credit for sales of ethanol produced in other States. By "explicitly depriv[ing] certain products of generally available beneficial tax treatment because they [were] made in certain other States," the Ohio law violated "the cardinal requirement of nondiscrimination." 486 U.S. at 274. Here, by denying a tax credit to Oregon landfills to the extent the landfill disposes of interstate waste, but granting credits to the extent the landfill is used for Oregon waste, Oregon is engaging in precisely the same prohibited conduct.

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as Oregon generators (see note 13, *supra*) and out-of-state generators certainly are no more unlikely to become insolvent than in-state generators. If some sort of "insurance fund" is justified, therefore, on the ground that generators might not be available to compensate the State for the clean-up costs, there is no basis for exempting Oregon generators from the obligation to contribute.

In sum, review of the record confirms that the Oregon tax clearly and unequivocally discriminates against interstate commerce in violation of the Commerce Clause.

CONCLUSION

The judgment of the Supreme Court of the State of Oregon should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., and
GILLIAM COUNTY, OREGON,
Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON,
Respondents.

COLUMBIA RESOURCE COMPANY, L.P.,
Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

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QUESTION PRESENTED

Whether a state disposal fee on out-of-state waste violates the Commerce Clause even though (1) the fee is based on costs incurred by the state for management and disposal of the out-of-state waste, and (2) management and disposal of in-state waste is funded by a combination of a lower disposal fee and other revenues.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Nos. 93-70 & 93-108

OREGON WASTE SYSTEMS, INC., and
GILLIAM COUNTY, OREGON,
Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,
Respondents.

COLUMBIA RESOURCE COMPANY, L.P.,
Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case presents the question not decided in *Chemical Waste Management, Inc. v. Hunt,* 112 S.Ct. 2009 (1992): whether a fee imposed on out-of-state waste violates the Commerce Clause when the fee recovers only costs incurred by the state that are related to the out-of-state waste. *See id.,* at 2016 n.9. Oregon imposes a cost-

based fee on out-of-state waste that is disposed in Oregon landfills. Or. Rev. Stat. § 459.298. Costs associated with in-state waste are paid through a lesser per-ton fee imposed on the waste's disposal and through other state revenue sources. Petitioners challenged Oregon's out-of-state waste disposal fee in state court, arguing that the fee violates the Commerce Clause because it is greater than the disposal fee assessed on in-state waste.

Selecting a swift but narrow path to appellate court review, petitioners filed a direct challenge in the Oregon Court of Appeals to the administrative rules setting the surcharge on out-of-state waste.[1] Petitioners' choice of forum thus bypassed any method of factfinding,[2] and it limited judicial review under Oregon law to "the face of the rule and law pertinent to it." *Gilliam County v. Dept. of Environmental Quality*, 316 Or. 99, 113, 849 P.2d 500 (1993) (hereafter citing decision in Oregon Waste Systems (OWS) Pet. Cert. 19a)[3] *quoting AFSCME Local 2623 v. Dept. of Corrections*, 315 Or. 74, 79, 843 P.2d 409 (1992). Precluded by petitioners' procedural choice from considering "whether the surcharge is impermissible as 'disproportionate' to the services rendered or to the costs incurred by the State," *ibid.*, the Oregon Court of Appeals and Oregon Supreme Court reviewed the surcharge only to determine whether it was constitutional on its face. The courts held—unremarkably, given the fee's express statutory nexus to actual costs—that the surcharge was not facially unconstitutional. OWS Pet. 17a, 43a-44a.

[1] The Oregon Court of Appeals ordinarily is the State's first level of appellate review, rather than a court of original jurisdiction. Its original jurisdiction in this instance is highly unusual.

[2] The Oregon Court of Appeals' authority to engage in factfinding is limited to claims of procedural irregularity in administrative proceedings that do not appear on the face of the record. As to such claims, the court may appoint a master to take evidence and prepare recommended findings. Or. Rev. Stat. § 183.482(7).

[3] For convenience, all references to the opinions of the Oregon Supreme Court and Oregon Court of Appeals are to the opinions as reproduced in the appendix to the OWS Petition for Certiorari.

A. Background

Oregon's approach to solid waste is first to reduce, reuse, and recycle—and then to dispose of the remaining waste in a safe, economic and proper manner. *See* Or. Rev. Stat. § 459.015(2)(a), (i). The state's goals are pursued through a comprehensive system of regulations and fees. *See generally* OWS Pet. Cert. at 34a-36a and n.14 (citing relevant statutes and describing system). Operators of landfill sites must pay a permit fee to cover the costs to the state of the permiting process and inspection programs. Or. Rev. Stat. § 459.235(2). An annual permit fee based on volume is also charged to landfill operators, Or. Rev. Stat. § 459.235(3), and an additional volumetric charge is assessed to pay for removal of hazardous substances at "orphan" sites throughout the state. Or. Rev. Stat. § 459.236. Solid waste generated in Oregon pays a disposal fee of 85 cents per ton.[4] Or. Rev. Stat. §§ 459A.110-.115. The proceeds from that fee are dedicated—that is, they must be used by the Oregon Department of Environmental Quality (DEQ) to fund its program for solid waste management, planning, waste reduction and recycling efforts, household hazardous waste disposal, and groundwater monitoring. Or. Rev. Stat. § 459A.120. Finally, specific waste problems have resulted in other restrictions and fees. For example, Oregon buyers of new motor vehicle tires pay another fee to help fund environmentally sound disposal of old tires. Or. Rev. Stat. §§ 459.705 to 459.790.

Oregon residents and others with sufficient in-state activities to pay taxes also finance sold waste management activities though general funds generated by income tax revenues. R. 671. These funds are used to help cover

[4] Petitioner Columbia Resources Company, L.P. (CRC) repeatedly refers to a $.50 per-ton fee on instate waste. CRC Br. 7, 8, 9, 15, 28, 31. It is undisputed, however, that as a result of a $.35 surcharge, in-state waste pays a fee of $.85 per ton. Or. Rev. Stat. §§ 459A.110(5) and 459A.115. *See* OWS Br. 6, 23.

the agency's costs of administering the state solid waste regulatory program, rulemaking and policy development, and statewide solid waste management planning. R. 592. State taxpayers also help fund tax credits and subsidies that Oregon makes available to landfill operators and others. For example, private companies, such as petitioner Oregon Waste Systems, Inc. (OWS), take an Oregon income tax credit of up to 50 percent for landfill expenses that qualify for Oregon's pollution control tax credit, including liner construction, leak detection systems, leachate collection and treatment, and groundwater monitoring. R. 593.

These fees and taxes, and the solid waste management program they help fund, serve the state's goals of reducing and recycling solid waste and of properly disposing of the waste that remains.[5] Other things being equal, as a result of these efforts, Oregon landfill capacity will be consumed more slowly—to the benefit of present and future generations of Oregonians *and* present and future generations of out-of-state residents whose waste can and will be disposed of in Oregon.

B. The Surcharge on Out-of-State Waste

1. *Legislative Process*

It was in this context that the Oregon legislature concluded that out-of-state waste should be required to pay the actual costs to the state of disposing of that waste. Or. Rev. Stat. § 459.297(1), passed in 1989, provides that "every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall

[5] See Or. Admin. R. § 340-90-005 *et seq.* (recycling and waste reduction); § 340-91-010 *et seq.* (waste reduction program and recycling certification); § 340-92-005 *et seq.* (general regulations regarding solid waste); § 340-93-001 *et seq.* (municipal solid waste landfills); § 340-95-001 *et seq.* (land disposal sites other than municipal solid waste landfills); § 340-96-001 *et seq.* (special rules for selected solid waste disposal sites).

pay a surcharge" to be set by the Environmental Quality Commission (EQC). The amount of the surcharge is to be established by rule and "shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste general out-of-state which are not otherwise paid for under the provisions of [statutes relating to solid waste disposal, domestic solid waste disposal, and household hazardous waste disposal]." Or. Rev. Stat. § 459.298. The statute itself thus limits the surcharge to "costs" incurred in disposing of the out-of-state waste, to the extent those costs are not already paid by other fees and assessments borne by in-state and out-of-state waste disposal alike. Under the statute, then, the surcharge on out-of-state waste can be less than the full cost to the state of disposal, but it can not be more than that cost.

The surcharge is to be based on costs that may include, but need not be limited to, out-of-state waste's proportionate share of the costs incurred for solid waste management, issuing new and renewal permits for solid waste disposal sites, environmental monitoring, and site closure and post-closure activities. Or. Rev. Stat. § 459.298. The funds generated by the surcharge are dedicated revenues—that is, they must be used by the Department of Environmental Quality (DEQ) to help pay the costs of "administering the solid waste program" established by Oregon law. Or. Rev. Stat. § 459.297(2).

2. *Administrative Process*

Pursuant to the statutory directive, the Environmental Quality Commission (EQC) undertook a rulemaking procedure to set the fee. EQC held hearings on the surcharge in the cities of Portland, Arlington (the closest town to the OWS landfill), and Medford, and received testimony and written comments from dozens of interested parties.[6]

[6] Oregon's rulemaking proceedings are informal and are akin to typical legislative proceedings. An agency is not required to base its rules on information received in the public hearings unless the agency's organic statute specifically imposes that requirement. Or. Rev. Stat. § 183.335(12). *Int'l Council of Shopping Centers v. Env.*

EQC retained an independent consultant, the National Economic Research Associates (NERA), to review the methodology used in calculating the surcharge, and then revised the methodology and fee in response to NERA's comments. R. 665, 725-750. A critical standard throughout the rulemaking process was the nexus between the cost to the State of out-of-state waste and the amount of the surcharge:

> The amount of the surcharge is to be determined by a reasonable assessment of the cost to Oregon of accepting out-of-state waste. The surcharge amount should *not* be inflated to discourage importation of waste, nor deflated to encourage importation of waste.

R. 588 (emphasis in original); *see also* R. 0022, 0033, 0197, 0667.

After extensive public hearings, EQC adopted administrative rules imposing the surcharge.[7] The rules, which became effective January 1, 1991, set the surcharge at $2.25 per ton. Or. Admin. R. § 340-97-110(3) (formerly

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Quality Comm'n, 27 Or. App. 321, 556 P.2d 138 (1976), *rev. denied* (1977). Similarly, witnesses in the hearings are not sworn, cross-examination of witnesses does not occur, no person is identified as a party nor does anyone participating in the hearing have to claim or show an interest in the rule in order to appear and be heard. *See* Oregon Attorney General's Model Rules of Procedure, Or. Admin. R. § 137-01-030. In short, the hearings are opportunities for public comment, but not formal record-building proceedings that create an official basis for or limitation on the agency's exercise of policy discretion.

[7] The administrative record provides support for the components of the surcharge and meets EQC's statutory obligations. The record does not and was not intended to give detailed consideration to the impact of the surcharge on the volume of out-of-state waste, the relative cost of disposing of out-of-state waste in Oregon as opposed to other states, or related factual matters that petitioners would have to prove to make out a Commerce Clause violation.

Or. Admin. R. § 340-61-115); Or. Admin. R. § 340-97-120(7) (formerly Or. Admin. R. § 340-61-120).

C. The Proceedings Below

Petitioners challenged the validity of the rules in the Oregon Court of Appeals under Or. Rev. Stat. § 183.400, a part of Oregon's administrative procedures act that differs markedly from federal administrative law. Although conferring broad standing to challenge a rule—"any person" may file a petition[8]—the scope of review under Or. Rev. Stat. § 183.400 is unusually narrow. Unlike the familiar federal "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A) (1988), the Oregon statute limits both the documents that can be reviewed and the actions the court may take. The court may examine only the rule itself, the statutory provisions authorizing the rule, and "all documents necessary to demonstrate compliance with applicable rulemaking procedures." Or. Rev. Stat. § 183.400(3). And the reviewing court may declare the rule invalid only if, on the record before it, it finds that the rule "(a) violates constitutional provisions; (b) exceeds the statutory authority of the agency; or (c) was adopted without compliance with applicable rulemaking procedures." Or. Rev. Stat. § 183.400(4). A rule challenge does not include review to see whether the rule is supported by substantial evidence. That is, the state court will not invalidate a rule on the basis that there is no testimony supporting it or that the record does not include evidence justifying it.[9]

Petitioners did not contend that EQC exceeded its statutory authority in adopting the surcharge or that it failed to follow applicable rulemaking procedures, and their contention that one component of the surcharge was inconsistent with another state statute was summarily rejected.

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[8] Or. Rev. Stat. § 183.400(1).

[9] *See* n.5, *ante*.

Gilliam County v. Dept. of Environmental Quality, OWS Pet. 10a. Their challenge rested principally on state and federal constitutional grounds.[10]

The state courts considered petitioners' facial challenge to the surcharge and held that the State's effort to make out-of-state waste pay its fair share and no more was consistent with the Commerce Clause. *Id.*, OWS Pet. 15a-19a; 38a-44a. And given the limitations of the procedure petitioners selected, their attempt to peer behind the face of the statute and the rule was unavailing:

> [B]efore we could say that the rules are unconstitutional, petitioners would have to show that the fees are excessive for the purposes for which they are collected or that there is no sufficient relation between the measure employed and the extent or manner of use of the state provided service.
>
> * * * *
>
> A facial review of the enabling legislation and the rules does not show that the fees are either excessive or unrelated to the state provided service. ORS 183.440(3) does not permit us to consider the evidence that petitioners would have to produce to show that the fees are, nevertheless, manifestly disproportionate to the costs incurred by the state to manage and facilitate disposal of out-of-state waste.

Id., OWS Pet. 44a; *see also id.* at 19a.

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[10] Both Oregon courts agreed with petitioners that a provision providing for legislative review of the surcharge violated the Oregon Constitution, but they concluded that the review procedure was severable and did not render the surcharge invalid. OWS Pet. 11a-15a, 27a-38a.

SUMMARY OF ARGUMENT

Oregon assesses a per-ton fee on out-of-state waste disposed of in Oregon landfills. By law, the fee must be based on the costs the State incurs that are attributable to that waste. The state agency responsible for setting the fee has set it at $2.25 per ton. The fee for disposal of in-state waste is set, by statute, at $.85 per ton. The differential in the disposal fees, however, does not mean that the overall costs borne by Oregon citizens and waste generators for in-state waste disposal are lower than for disposal of out-of-state waste. Under Oregon's statutory scheme, in-state disposal costs are recovered partially through the $.85 per ton disposal fee and also through general fund revenues (*i.e.*, state income taxes) that support the overall statewide waste management program. Out-of-state waste producers pay a higher disposal fee because general revenues and fees generated from in-state waste would otherwise have to support the proportionate share of Oregon's program attributable to the costs of out-of-state waste disposal.

Petitioners argue that this scheme for recouping out-of-state garbage disposal costs patently discriminates on its face and fails the Commerce Clause "close scrutiny" test because Oregon has a non-discriminatory alternative. That alternative is for Oregon to abandon its chosen method of financing in-state waste reduction and disposal in favor of one that recoups all costs through a uniform dumping fee. The only other option is for Oregon to forego recovery of the full cost of out-of-state garbage disposal by reducing the out-of-state fee to match the in-state $.85 fee, an option which effectively would require Oregon to provide a subsidy to out-of-state waste producers.

Petitioners' arguments begin with the flawed premise that Oregon's funding scheme patently discriminates against interstate commerce. Petitioners narrowly focus on the differential between the in-state and out-of-state

disposal fees as the sole basis for labeling Oregon's fee "patently discriminatory." Under the statutory scheme as a whole, however, Oregon recovers the full cost of out-of-state garbage through dumping fees that ultimately are passed on to non-resident garbage generators, while recovering the full cost of in-state garbage disposal from a combination of dumping fees (that similarly are passed on to Oregon garbage generators) and income and other taxes that are or will be paid in-state. This is not "economic protectionism"—an attempt by the state to isolate itself from out-of-state waste, or an attempt to put any person or firm at a competitive disadvantage. At most, petitioners' arguments boil down to a claim of "resource protectionism." Where resource rather than economic protectionism is the Commerce Clause evil arguably implicated by state regulation, the burdens placed on out-of-state users of an in-state resource need not be identical to the burdens placed on in-state users, as long as the burdens are reasonably equivalent. In Oregon, they are.

The solid waste management funding structure that the Oregon legislature has adopted serves the dual objectives of distributing the costs of Oregon's system broadly to the in-state interests that benefit from them, and narrowly recovering those program costs from the out-of-state producers that also benefit. The differential fee on in-state and out-of-state waste, because it is cost-based, does not patently discriminate against interstate commerce. The statutory fee system burdens in-state and out-of-state waste generators evenhandedly. Whatever restriction Oregon's fee may cause to the flow of garbage into the state—although none has been shown—is merely a consequence of Oregon's legitimate objective of capturing the actual costs the disposal of that waste creates for Oregon, and it is a burden on interstate commerce that is clearly outweighed by that objective. Thus, unlike the differential fee at issue in *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (1992), Oregon's fee is not protectionist in

purpose, nor has it been demonstrated to have that effect. Oregon should not have to show that there are no other ways to finance its solid waste program where there is nothing protectionist about Oregon's current scheme.

Oregon has sound policy reasons for collecting the revenue to fund its program in part through general tax dollars, rather than exclusively through an across-the-board user fee placed on the disposal of in-state and out-of-state garbage alike. All Oregon citizens and others with significant in-state contacts, regardless of the amount of in-state garbage they generate, benefit from a clean and healthful environment, which is the overall goal of Oregon's solid waste management program. The benefit runs generally to the State as a whole, and it accrues regardless of any one individual's or business's direct or indirect contribution to the problem of waste production. Therefore the Oregon legislature reasonably has determined that the State's efforts to keep Oregon's environment as clean and livable as possible should be funded in common by those who benefit more generally from Oregon's efforts. Axiomatically, non-residents collectively do not share in that benefit. Out-of-state residents derive a measurable benefit from Oregon's program only at the point that they seek to take advantage of available Oregon landfill capacity by importing their waste into Oregon for disposal. Thus, even if Oregon could somehow assess a general tax on out-of-state residents—which it obviously cannot do—any attempt to recover the costs attributable to out-of-state waste through such a mechanism would make no sense. Far more rational is the recovery mechanism Oregon in fact uses—a special and tailored fee assessed only on the garbage that out-of-state producers in fact import into Oregon to consume Oregon landfill capacity.

Accordingly, even if this Court were to conclude that Oregon's solid waste funding structure should be held to the most exacting Commerce Clause standards, the

fee should be sustained. If Oregon is to pursue its concededly legitimate goal of recovering the full cost of the disposal of out-of-state waste in its landfills, Oregon has no alternative but to impose the $2.25 fee. No principled Commerce Clause rationale should coerce the State into altering its in-state funding structure to eliminate the differential fee. For Oregon to be forced to abandon its general revenue funding of in-state garbage management and disposal and increase the fee for that disposal to match the out-of-state fee would not eliminate any burden on interstate commerce that incidentally results from the out-of-state fee. Non-resident waste generators would continue to pay the same fee that they presently do; any deterrent effect the present fee may have on the importation into Oregon of out-of-state waste would remain unchanged.

Requiring Oregon to restructure its in-state funding system where no discernible benefit to interstate commerce would result is particularly inappropriate given this Court's recognition of the deference and leeway federal courts should give States in the methods they choose to fund the provision of basic governmental services. That basic principle of federalism would be severely undermined were the Court to tell Oregon that if it seeks to pursue the legitimate objective of requiring out-of-state garbage to pay its fair share, it may *only* do so in one manner. The State should not be placed in such a political straightjacket, where doing so furthers none of the basic purposes or policies that underlie the Commerce Clause or this Court's jurisprudence construing that clause.

Petitioners conclude their briefs in this Court with a variety of fact-based arguments about the components of Oregon's fee and perceived flaws in the way it was calculated. Those are claims that petitioners either did not or could not raise below; they inappropriately press them at this level. Having availed themselves of a narrow procedural vehicle to obtain expedited review of the face

of Oregon's rule, petitioners cannot now claim that the Court should engage in an intensive fact-based examination that has never been made by the state courts and that cannot be reliably made on the record in this case.

ARGUMENT

I. INTRODUCTION

Although some private commercial interests (*i.e.*, privately operated landfills, entrepreneurial garbage haulers) have an economic stake in the "business" of solid waste disposal, the ultimate oversight and responsibility for managing waste is intensively governmental. Oregon, like most or all States, has embarked on a comprehensive program of managing waste generated within or imported into its borders. To better meet the problem of the growing amount of waste and the growing demand that something be done with it, Oregon has an extensive regulatory framework designed to minimize waste and to manage its disposal. The State's efforts take many forms: reuse, reduction, recycling and, ultimately, environmentally safe disposal. As is true of any governmental regulatory effort, Oregon's waste program requires an investment of human time and physical resources, which in turn requires funding. Typical of the funding for most programs that provide general benefits to all of a State's citizens, essential revenue for Oregon's regulatory program comes from a combination of funds generated by statewide taxes and by special user fees. The manner in which Oregon comprehensively regulates its statewide waste management program and provides funding for it is, in short, unremarkable.

In challenging Oregon's fee on out-of-state waste disposal, petitioners proceeded on a narrow theory, and they availed themselves of a limited state court proceeding adequate to address their theory, but little more. By bringing an original "rule challenge" action in the Oregon Court of Appeals, petitioners directed their constitutional

challenge and the court's review to the face of the rule only. The review petitioners asked for was myopic. The rule was to be viewed in isolation, severed from Oregon's comprehensive waste management program as a whole and from the full range of other costs the State incurs and its method of funding those costs. The only record available to the state court was the public hearing and agency documentation of the informal, non-adjudicatory rulemaking procedure. The State could not present to the court evidence or testimony from agency officials or other experts to explain the fee or to defend the agency's calculation of the costs of out-of-state waste. The record was not developed for the purpose of demonstrating the effects of the fee on the flow of interstate commerce into Oregon landfills. Nor could the state courts, given the limitations on their jurisdiction, examine those effects. Finally, the fees and financial burdens that are placed on in-state interests were wholly beyond the scope of the state courts' review or the record available to them.

The restrictions on the judicial review that petitioners chose, however, fit the narrow scope of their theory. Their claim was that Oregon's fee facially and patently "discriminates" against interstate commerce because the per-ton disposal surcharge is greater for out-of-state waste than for in-state waste, and it is therefore unconstitutional. Their position was that no set of facts or circumstances could exist under which the fee could be considered "nondiscriminatory," and thus the burden fell upon the State to demonstrate that no nondiscriminatory alternative was available. At that point, petitioners apparently hoped to hamstring the State in presenting a defense, arguing, as they argue still, "that the limited form of judicial review authorized by Oregon's Administrative Procedures Act disables, in large part, the State from factually justifying its discriminatory treatment of foreign waste." CRC Br. 13-14. Alternatively, they urged, as they urge still, that an across-the-board fee on all waste disposal was so

plainly "adequate" that the State needed no opportunity to demonstrate the absence of a satisfactory nondiscriminatory alternative. *E.g.*, CRC Br. 14; OWS Br. 19-20.

The question this case presents is both significant and stark: Under the Commerce Clause, may a State under any circumstances impose a cost-based disposal fee on out-of-state waste that is higher than the disposal fee assessed on in-state waste? Petitioners invite this Court to give an equally stark answer: No, not ever. Under petitioners' analysis, the cost-based character of the surcharge is irrelevant; the fact that, absent the surcharge, out-of-state waste disposal necessarily is subsidized by in-state revenues is of no moment; and the lack of any demonstration that the surcharge in purpose or in effect discourages the importation of out-of-state waste or conserves resources for in-state waste alone is beside the point. As petitioners approach the issue, the mere fact of a surcharge on out-of-state waste is the be-all and end-all of the inquiry, because the differential is "facially discriminatory." No further inquiry is required or, indeed, permitted.

The dilemma their position poses for States is real. The result petitioners seek would leave a State with only two choices. Either a State must provide the benefit of its managed solid waste disposal program at less than its actual costs to out-of-state interests that reap the advantage of the State's self-funded regulatory and conservation efforts, or a State must completely restructure its in-state method of funding its waste management program. The fact that petitioners' position would force States to those options is troubling in itself. Their position is all the more troubling when they disavow the relevance of any realistic examination of the effect of the state fee, with the result that States are forced to these untenable choices in an effort to protect interstate commerce that has suffered no harm in fact.

Petitioners' approach is artificial, and has nothing to commend it in terms of principle or result. Solid waste unquestionably is an article of commerce subject to the full protection of the federal Commerce Clause. But that protection must be meaningfully examined in the context of the nature of the commerce for which protection is sought. Petitioners too quickly assume that solid waste can be equated with consumer goods that are actively bought and sold in a competitive market environment. Facially disparate fees on market goods that must compete for the same buyer readily and immediately implicate values that are fundamental to the Commerce Clause —the free flow of goods across state lines, anticompetitive fees and regulations, protection of local economic interests, and economic isolation. Landfill operators may compete with one another for waste, but in-state and out-of-state waste are not competing goods in a common market in the sense that apples and automobiles are. The fact that a different fee structure applies to one and not to the other at an isolated point in the long chain of their generation, collection, transport and disposal provides insufficient information, in and of itself, to determine whether interstate commerce is affected in any way that the Commerce Clause protects against. Where the surcharge reflects the regulatory costs that are fairly attributable to the disposal of out-of-state waste, a facial commerce Clause challenge to the fee must fail.

II. THE GOAL OF FEDERAL PROTECTION OF INTERSTATE COMMERCE IS TO PREVENT ECONOMIC ISOLATION AND PROTECTIONISM BY INDIVIDUAL STATES.

The Constitution's grant to Congress of the power to regulate interstate commerce, Article I, section 8, clause 3, carries with it negative implications that limit state power over such commerce. *See Philadelphia v. New Jersey,* 437 U.S. 617, 623 (1978); *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 535 (1949). "No state

may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade." *Chemical Waste Management, Inc. v. Hunt,* 112 S. Ct. at 2012. This is the basic teaching of the cases involving garbage—and, indeed, is a straightforward application of the general Commerce Clause principle that "our economic unit is the Nation." *H.P. Hood & Sons v. DuMond,* 336 U.S. at 537. *See Philadelphia v. New Jersey,* 437 U.S. at 623, 627.

The Constitution's intent to "fuse into one nation a collection of independent, sovereign states," *Toomer v. Witsell,* 334 U.S. 385, 395 (1948), and to "establish a norm of comity," *Austin v. New Hampshire,* 420 U.S. 656, 660 (1975), finds expression as well in the Privileges and Immunities Clause, Article IV, section 2, cl. 1, which in origin and interpretation parallels the Commerce Clause. *Hicklin v. Orbeck,* 437 U.S. 518, 531-34 (1978).[11] In *Hicklin,* the Court discussed the interrela-

[11] The discussion in *Austin v. New Hampshire* demonstrates the reinforcing values contained in the Privileges and Immunities and Commerce Clauses:

> The origins of the Clause do reveal, however, the concerns of central import to the Framers. During the preconstitutional period, the practice of some States of denying to outlanders the treatment that its citizens demanded for themselves was widespread. The fourth of the Articles of Confederation was intended to arrest this centrifugal tendency with some particularity. It provided:
>
> > "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."
>
> The discriminations at which this Clause was aimed by no means eradicated during the short life of the Confederation,

tionship of the Privileges and Immunities Clause and the Commerce Clause:

> Although appellants raise no Commerce Clause challenge to the [Alaska Hire] Act, the mutually reinforcing relationship between the Privileges and Immunities Clause and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism, *see Baldwin v. Montana Fish and Game Comm'n,* 436 U.S. [371] at 379-380 [(1978)]—renders several Commerce Clause decisions appropriate support for our conclusion. * * *

The Court in *Hicklin* concluded its opinion by stating:

> As Mr. Justice Cardozo observed in *Baldwin v. G.A.F. Seelig,* 294 U.S. 511, 523 (1935), the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

437 U.S. at 534.

Recognizing "economic isolation" and "protectionism" as the evils the Constitution sought to prevent, but aware that legitimate state legislation may incidentally burden

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and the provision was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation. * * *"

Id. at 660-661 (footnote omitted). The phrase within Article IV of the Articles of Confederation providing that the people of each State "should enjoy [within any other state] all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof, respectively," was deleted by the constitutional framers, who had instead conferred on the federal government exclusive power to regulate commerce among the several states. *See Lemmon v. People,* 20 NY 562, 627 (1860) (opinion of Wright, J.), cited in *Austin v. New Hampshire,* 420 U.S. at 661, n.6. Nothing suggests, however, that this amendment intended in the area of commerce to confer greater rights on citizens than they would have enjoyed under the Privileges and Immunities Clause.

interstate commerce, *Philadelphia v. New Jersey,* 437 U.S. at 623-24, this Court has constructed a test that examines the state objectives, the means chosen to advance those objectives, and the impact on interstate commerce. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Philadelphia v. New Jersey,* 437 U.S. at 624, quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). However, if a state law discriminates against interstate commerce, on its face or in practical effect, it typically will be subjected to "close scrutiny" to determine whether it serves a legitimate local purpose and whether that purpose could be served as well by available nondiscriminatory means adequate to preserve the local interests at stake. *Chemical Waste Management v. Hunt,* 112 S. Ct. at 2014, *Maine v. Taylor,* 477 U.S. 131, 139 (1986); *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 353 (1977). And when a state law amounts to simple economic protectionism, the Court has on occasion adopted a "virtually per se rule of invalidity." *Philadelphia v. New Jersey, supra,* 437 U.S. at 624; *see also Wyoming v. Oklahoma,* 112 S. Ct. 789 (1992).

A closely parallel test has been applied under the Privileges and Immunities Clause. The "standard against which a State's differential treatment of nonresidents would be evaluated" [12] was articulated in *Toomer v. Witsell,* where the Court recognized that a disparity in treatment between in-state and out-of-state residents is constitutional if the State has valid reasons, apart from residency, for the difference:

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It

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[12] *Baldwin v. Montana Fish and Game Comm'n,* 436 U.S. 371, 399-400 (1978) (Brennan, J., dissenting).

> does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

334 U.S. at 396 (footnote omitted).[13]

In short, under either the Commerce Clause or the Privileges and Immunities Clause, the Court examines a State's interests to ensure that they are legitimate. It also examines the means a State chooses to advance those interests to ensure that they do not unnecessarily intrude on the federal interest in preserving national cohesion and preventing state isolationism. It is no surprise, then, that the tests under the two clauses are similar in text and in result. As this Court has appropriately recognized, the analysis under one clause is informative of the analysis to be used in similar cases arising under the other clause. *See, e.g., Hicklin v. Orbeck*, 437 U.S. at 534.

Finally, in applying the foregoing tests, the Court consistently has recognized one principle that is of particular import in the analysis of the constitutionality of Oregon's solid waste funding scheme involved here. That principle is that a state is allowed to recover from interstate com-

[13] For recent cases in which this Court has applied the *Toomer* test, *see Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (invalidating Virginia's residency requirement for admission to the bar, without examination, of lawyers admitted to practice in another state); *Barnard v. Thorstenn*, 489 U.S. 546 (1989) (invalidating local district court rule of the Virgin Islands imposing residency requirement for admission to the district court bar).

merce the "fair share" of the state's costs that are attributable to that commerce. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 620 (1981); *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977); *Toomer v. Witsell*, 334 U.S. at 399.

> We . . . regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike.

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707, 714 (1972). *See also Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959) (recognizing that "the founders did not intend to immunize [inter]state commerce from carrying its fair share of the costs of state government in return for the benefits it derives from within the State.")[14]

III. NO COMMERCE CLAUSE INTEREST IS NECESSARILY IMPLICATED BY OREGON'S DIFFERENTIAL FEE STRUCTURE FOR IN-STATE AND OUT-OF-STATE WASTE.

Petitioners' central argument is that Oregon's funding scheme for recouping out-of-state garbage disposal costs

[14] Petitioners cite *Guy v. City of Baltimore*, 100 U.S. 434 (1880) for the proposition that state fees which purport to be cost-based may nevertheless impermissibly discriminate against interstate commerce. OWS Br. 11-12. While the proposition is sound as far as it goes, it does not go very far in this case. In *Guy*, a fee denominated a "wharfage" fee was imposed only on vessels carrying out-of-state goods. The Court had no difficulty invalidating this discriminatory fee as the protectionist measure it obviously was. The State was seeking to "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." 100 U.S. at 443. Moreover, there was no showing that the fee was in fact related to wharf maintenance costs or that in-state interests contributed to wharf maintenance in other ways. The case provides minimal guidance here.

"patently discriminates" on its face against interstate commerce and that it is invalid under this Court's decision in *Chemical Waste Management v. Hunt,* 112 S.Ct. 2009. Petitioners maintain that because Oregon could equalize the in-state and out-of-state waste disposal fees, either by lowering the out-of-state fee to $.85 per ton, or by raising the in-state fee to $2.25 per ton, it is *per se* unconstitutional for Oregon to have a disparate fee of any kind in any amount. OWS Br. 19-20; CRC Br. 10, 14. In effect, petitioners' position is that the fact of a disparate fee on the disposal of out-of-state garbage, without more, is enough to establish that Commerce Clause interests are infringed by Oregon's surcharge, thus requiring Oregon to demonstrate under a close scrutiny test that it has no choice but to impose the surcharge if its interests are to be served.

Oregon can meet that stringent test, if it is required to do so. But petitioners' attempt to treat *Chemical Waste Management v. Hunt* as dispositive oversimplifies the analysis, and disregards much of the Court's decision and its rationale. The only similarity between the Alabama fee challenged in *Chemical Waste* and the fee challenged here is that in each case the State placed higher disposal costs on out-of-state waste than on in-state-waste. There, the similarity ends. The Alabama out-of-state fee was dramatically higher—$72 more—than the in-state fee, a fact which in and of itself suggested that both the purpose and effect of the fee was to deter the flow of out-of-state waste across Alabama's borders. Alabama, moreover, conceded what the breadth of the differential alone suggested—that Alabama's purpose in setting the significantly higher fee was to reduce the flow of out-of-state waste into the Alabama disposal facility. 112 S. Ct. at 2015 and nn.7 & 8. Both record evidence and factual findings established that Alabama had achieved its intended effect: in fact, the importation of out-of-waste had been drastically reduced as a direct result of the higher fee. 112 S. Ct. at 2014 n.4. Finally, and of particular significance

for this case, Alabama made no attempt to justify its out-of-state disposal fee on the basis that the fee reflected actual regulatory costs Alabama incurred in disposing of that waste. To the contrary, the Court in its decision specifically noted that Alabama had failed to justify the fee on any cost-related basis, and it specifically reserved the question whether the outcome would have been the same had Alabama's fee been based on actual state costs. 112 S. Ct. at 2016, n.9.

For petitioners to argue, as they have throughout this litigation, that the decision in *Chemical Waste* is controlling is to invoke tests rather than analysis, and to serve results rather than principle. Oregon's surcharge on out-of-state waste disposal is, in fact, distinguishable from the Alabama fee in ways that do and should make a difference under the Commerce Clause. The small differential between Oregon's in-state and out-of-state waste disposal fees permits only the weakest inference that out-of-state garbage producers suffer a burden that will serve as a disincentive to their use of Oregon landfills. Given the direct and mandatory nexus to actual costs, the inference disappears. The face of the challenged fee structure does not permit a conclusion that Oregon has erected any explicit barrier to out-of-state waste, or that it is somehow burdening out-of-state interests in an effort to provide a benefit to in-state interests at out-of-state expense.

A. Oregon's Surcharge on Out-of-State Waste Is Not Patently Discriminatory.

Unlike Alabama's surcharge, Oregon's surcharge on the in-state disposal of out-of-state waste is not patently discriminatory. Indeed, it has not been shown to be discriminatory at all. Petitioners narrowly focus on the differential between the amount of the in-state and out-of-state disposal fees. The appropriate inquiry, however, should consider the entire structure the Oregon legislature has adopted to pay for solid waste management and disposal. As this Court observed in *Maryland v. Louisiana,* 451

U.S. at 756, "[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme."

Viewed in its entirety, Oregon's statutory scheme for solid waste management and disposal imposes similar costs on in-state and out-of-state waste producers. Oregon residents support DEQ's solid waste management program through income taxes and by paying, indirectly, the numerous fees imposed on landfill operators and the dumping fee on in-state waste. R. 592, 593, 671. Out-of-state waste producers pay the additional cost of the state's solid waste management program for disposing of out-of-state waste by paying, also indirectly, the out-of-state disposal fee. It is demonstrably true, then, that Oregon imposes costs on *both* in-state and out-of-state interests in order to finance solid waste management and disposal. Nothing on the face of Oregon's overall funding scheme, or in the record before the Court, demonstrates that the respective costs of in-state and out-of-state waste are not distributed fairly to in-state and out-of-state residents. Certainly it cannot be said that Oregon's funding scheme patently discriminates against interstate commerce.

The Court's decision in *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941 (1982), which petitioners almost entirely overlook, demonstrates that the mere fact that a State places greater regulatory burdens on out-of-state interests will not suffice to render the scheme "patently discriminatory." Nebraska in that case imposed more severe ground water conservation restrictions on the withdrawal of water destined for use out-of-state than it imposed on the withdrawal of water for use in-state. It did, however, impose other non-identical conservation restrictions on water withdrawn for in-state use. The Court upheld the restrictions on interstate transfers, stating that the analysis should turn on the overall evenhandedness of the regulatory burdens, not just on the fact of a difference in the regulations that applied to in-state and out-of-state interests:

> Although Commerce Clause concerns are implicated by the fact that Section 46-613.01 applies to interstate transfers but not to intrastate transfers, there are legitimate reasons for the special treatment accorded requests to transport ground water across state lines. Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation. At least in the area in which appellants' Nebraska tract is located, the first three standards of Section 46-613.01 may well be no more strict in application than the limitations upon intrastate transfers imposed by the Upper Republican Natural Resources District.

458 U.S. at 955-56.

Sporhase was a differential regulation case, not a differential fee case, but its rationale applies with full force here. As long as a state does not force out-of-state interests to bear the brunt of in-state conservation programs, a state need not demonstrate that its purposes cannot be served through alternative means—*i.e.,* identical restrictions placed on in-state and out-of-state interests. Here, Oregon does not shift to out-of-state interests the brunt of funding Oregon's solid waste management program; significant in-state financial support is directed to Oregon's regulatory program. Oregon accordingly is not required to demonstrate that it cannot place the identical fee on in-state and out-of-state waste in order for the funding scheme to pass Commerce Clause scrutiny.

B. Oregon's Surcharge Is Not Protectionist; But Even an Incidental Resource Protectionist Effect Would Not Render Oregon's Fee Invalid.

This Court consistently has used the "close scrutiny" analysis to test those statutory schemes that are designed to benefit local economic interests at the expense of out-

of-state interests, *e.g., New Energy Co. v. Limbach,* 486 U.S. 269 (1988); *Hunt v. Washington State Apple Commission,* 432 U.S. 333 (1974); *H. P. Hood & Sons, Inc. v. DuMond, supra*; or where the clear purpose or effect of the statutory scheme is to protect or preserve local resources at the expense of out-of-state interests. *Hughes v. Oklahoma,* 441 U.S. 322 (1979); *Philadelphia v. New Jersey, supra.* Petitioners far too quickly assume that both a protectionist effect and purpose can be inferred from the fact of the differential in Oregon's fees alone, and that any effect is at the expense of out-of-state interests. In fact, however, Oregon's surcharge, unlike the Alabama fee at issue in *Chemical Waste,* is not protectionist in purpose and has not been demonstrated to be protectionist in effect.

Economic protectionism traditionally is thought of as conferring on in-state products or businesses a commercial advantage in the local marketplace. *E.g., New State Energy Co. v. Limbach,* 486 U.S. at 274. Where a state's taxation, fee or regulatory structure, in purpose or effect, operates to give local products or businesses a competitive advantage over in-state products offered for sale in the state, economic protectionism is present. While garbage is an article of commerce, *Philadelphia v. New Jersey,* 437 U.S. at 622-23, it is not a commodity that is sold in the marketplace; rather, it is disposed of at a cost. Petitioner OWS, for example, does not buy garbage to put in its landfill; waste generators *pay* OWS to take their waste. Local businesses simply do not compete with out-of-state businesses in the sale of garbage. Accordingly, a differential between in-state and out-of-state waste disposal fees does not necessarily equate with economic protectionism; the fees do not alter the price of a product that is competing with other products for common purchasers, and thus do not create any kind of commercial disadvantage for out-of-state interests.

In the context of waste disposal, the only way in which "economic protectionism" might be at work is if Oregon's

fee were designed to shift a disproportionate share of the costs of its regulatory program to out-of-state interests, and in that way "protect * * * local residents' pocketbooks." *E.g., Philadelphia v. New Jersey,* 437 U.S. at 626. It cannot be said on the record before this Court, however, that under Oregon's statutory scheme, in-state and out-of-state waste producers do not share equally in paying Oregon's regulatory costs attributable to solid waste disposal.

Nor is this a case in which, based on the differential in the in-state and out-of-state fees alone, the Court can conclude that "resource protectionism" is at work. In *Chemical Waste Management v. Hunt,* the Court had little difficulty concluding that Alabama's additional $72 per-ton fee on hazardous waste was imposed in order to reduce the flow of out-of-state hazardous waste into Alabama and to preserve, by reducing out-of-state waste, Alabama's limited hazardous waste landfill capacity. The dramatic dollar disparity the surcharge created between the disposal costs of in-state and out-of-state hazardous waste was itself a basis for the inference that the fee structure was intended to protect the State's landfill capacity from out-of-state hazardous waste. Alabama, moreover, had conceded as much. Finally, the evidence demonstrated that the Alabama fee in fact had achieved its intended effect—that is, it had drastically reduced the flow of hazardous waste into Alabama.[15]

Here, no hearing has been held and no factual findings have been made as to the actual deterrent effect, if any, of Oregon's out-of-state fee. But the added $1.40 per-ton fee on out-of-state garbage does not support an inference that Oregon's fee serves as a significant disincentive for the disposal of garbage in Oregon.[16] Even if that infer-

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[15] As this Court found, "[t]he volume of hazardous waste burned at the Emelle facility fell dramatically from 791,000 tons in 1989 to 290,000 tons in 1991." 112 S. Ct. at 2014 n.4.

[16] If one were to assume that the hypothetical average nonresident generated 200 pounds of garbage per month, and assuming

ence could be drawn, that alone would not invalidate Oregon's fee or require Oregon to demonstrate why it cannot serve its cost-recovery interests in any other way. As the Court was quick to point out in *Chemical Waste Management v. Hunt,* protection of state resources is not an illegitimate purpose or effect; it simply cannot be achieved through the illegitimate means of forcing out-of-state waste to bear the burden, when in-state waste does not. 112 S. Ct. at 2014. *See also Sporhase v. Nebraska, supra* (confirming that a statutory scheme which has a resource protectionist effect is not thereby subject to "close scrutiny" review). Here, Oregon bears the full costs of disposal of in-state waste. It does not force non-residents to make up for costs Oregon is not willing itself to bear.

Finally, Oregon's statutory fee structure cannot, at least on its face, be charged with achieving resource protectionism by erecting "explicit barriers" to commerce between the States. Again, *Sporhase v. Nebraska* is instructive. The Court, as already discussed, declined to subject Nebraska's differential restrictions on in-state and out-of-state ground water transfers to "close scrutiny," for in actual operation Nebraska's regulations placed evenhanded burdens on in-state and out-of-state interests. The Court invalidated, however, Nebraska's reciprocity provision [17] because it "operate[d] as an explicit barrier to commerce between" Nebraska and Colorado. *Sporhase v. Nebraska,* 458 U.S. at 957. Unconvinced that the flat prohibition on the export of Nebraska water significantly advanced the State's legitimate conservation objectives, and finding that the prohibition was not "narrowly tailored to serve

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the fee Oregon imposes were passed on to that non-resident, the non-resident would see a 14¢ per month increase in its garbage bill.

[17] Nebraska's reciprocity provision forbade the exportation of water to another state that did not allow the export of water into Nebraska. The adjoining State of Colorado did not allow the export of ground water out of the state; hence, Nebraska's statute also did not allow its water to be transferred into Colorado.

that purpose," the Court held that it "does not survive the 'strictest scrutiny' reserved for facially discriminatory legislation." 458 U.S. at 958 (citation omitted).[18]

As *Sporhase v. Nebraska* recognizes, statutory schemes that attempt to conserve local resources by erecting "explicit barriers" to the use of those resources are subject to "close scrutiny." The two garbage cases to reach this Court in addition to *Chemical Waste Management v. Hunt* also involved statutes which, like Nebraska's reciprocity provision, facially erected "explicit barriers" to the interstate flow of garbage by directly forbidding the importation of out-of-state waste into local landfills. *Philadelphia v. New Jersey, supra* (ban on the importation of waste from outside the state); *Fort Gratiot Landfill v. Mich. Dept. of Natural Resources,* 112 S. Ct. 2019 (1992) (ban on importation of waste from outside the county in which the disposal facility is located). No legitimate argument can be made that Oregon's funding scheme for the disposal of solid waste operates in the same way. Oregon's landfills are open to out-of-state waste; no state policy makes them inaccessible to interstate commerce. Petitioners must rely on the fact of the differential fee alone to make out that claim. But as *Sporhase v. Nebraska* demonstrates, the examination must realistically focus on the overall burdens placed on in-state and out-of-state commerce. That is an examination that petitioners have scrupulously avoided, because in fact that examination reveals that there is no special disincentive

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[18] *Sporhase v. Nebraska* thus supports two points Oregon makes as to why "close scrutiny" is not appropriate in testing Oregon's garbage disposal funding scheme. First, in determining whether a statutory scheme discriminates, the Court does not look at a single part of that scheme, but examines the scheme in its entirety to determine whether interstate commerce is being treated in a discriminatory manner. Second, at least in the area of resource protectionism, a statutory scheme that is intended to be protectionist is not subject to "close scrutiny" absent a demonstration that interstate commerce *in fact* is being unevenly treated.

for out-of-state waste disposal, and there is nothing protectionist about Oregon's fee.

C. Oregon's Surcharge Is Cost-Based.

Unlike Alabama's surcharge imposed on hazardous waste imported into the State, Oregon's surcharge is required by statute to be based on Oregon's costs incurred in managing the disposal of that waste. Or. Rev. Stat. §§ 459.298; 459.297(2). In *Chemical Waste Management v. Hunt,* this Court specifically left open the question whether Alabama could have justified its out-of-state fee if it had been based on the costs to Alabama of its disposal, thus requiring out-of-state waste only to bear its "fair share" of the state's disposal costs. 112 S. Ct. at 2016 n.9. The Court did not explicitly indicate whether Alabama's surcharge would have been exempt from "close scrutiny" review if it had been based on the actual costs Alabama incurred in disposal of the out-of-state waste. Indeed, no Commerce Clause decisions appear to have faced this question. Three cases arising under the Privileges and Immunities Clause, however, suggest that a state's imposition of cost-based, disparate fees on non-residential use of in-state services or resources do not implicate the kinds of concerns that would merit this court's heightened scrutiny.

In *Toomer v. Witsell,* the Court rejected South Carolina's claim that its $2500 non-resident shrimp boat fee was justified when compared to the $25 fee imposed on residents. South Carolina had claimed that even though the disparate fee worked a virtual exclusion of non-residents from fishing in the 3-mile zone off the South Carolina coast, the fee was a legitimate effort by South Carolina to conserve its shrimp supply and "to head off an impending threat of excessive trawling." 334 U.S. at 397. The Court was unpersuaded that non-residents were "a peculiar source of the evil" at which South Carolina's conservation and excessive trawling purposes were aimed.

Significantly, however, the Court recognized that South Carolina was not without power under the Privileges and Immunities Clause

> to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay.

334 U.S. at 399 (emphasis added). *See also Mullaney v. Anderson,* 342 U.S. 415, 417 (1951) (states are "not without power" to impose higher non-resident fees if they "would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay"); *Baldwin v. Montana,* 436 U.S. at 404 (Brennan, J., dissenting) ("*Toomer* and *Mullaney* allow additional charges to be made on nonresidents based on both the added enforcement costs the presence of nonresident hunters imposes on Montana and the State's conservation expenditures supported by resident-borne taxes").

The Court's jurisprudence, in short, provides abundant support for the conclusion that Oregon's solid waste disposal funding scheme does not warrant close scrutiny under the Commerce Clause. Oregon does not patently discriminate against out-of-state waste because Oregon's fee system does not, on its face, demonstrate that in-state and out-of-state waste producers are required to pay disproportionate dollar amounts to support Oregon's solid waste management efforts. Oregon's surcharge on out-of-state waste is required to be based on the State's actual cost of the waste's in-state disposal; Oregon does not ask out-of-state waste to bear the brunt of the funding for Oregon's regulatory program. Oregon's fee structure is not protectionist in purpose or effect. But even if the fee does have some limited resource protectionist effect, it does not erect an "explicit barrier" to the entry of out-of-

state garbage. Finally, drawing from the "mutually reinforcing" values of the Privileges and Immunities Clause, cost-based but disparate non-resident fees for local services are not a federal concern at all. Oregon's funding scheme simply poses none of the evils associated with this Court's "close scrutiny" decisions.

IV. OREGON'S STATUTORY FUNDING SURVIVES CONSTITUTIONAL SCRUTINY BECAUSE THE BURDENS IMPOSED ON INTERSTATE COMMERCE ARE ONLY INCIDENTAL AND OREGON HAS AN UNQUESTIONABLY LEGITIMATE INTEREST IN RECOVERING THE COSTS OF IN-STATE DISPOSAL OF OUT-OF-STATE WASTE.

When the evils of economic protectionism and isolation are not present in a statutory regulatory scheme that otherwise does not patently discriminate against interstate commerce, this Court tests the scheme under the test articulated in *Pike v. Bruce Church* and applied in *Sporhase v. Nebraska*:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted).

Sporhase v. Nebraska, 458 U.S. at 954.

Oregon's statutory funding scheme easily satisfies this test. The safe and environmentally appropriate disposal of solid waste is of indisputable public importance and its regulation undoubtedly falls within the core arena of a

state's police power. Adequate funding obviously is crucial to the state's successful regulatory efforts. Oregon's funding scheme, because it legitimately seeks only to require non-resident waste producers to pay the costs attributable to in-state disposal, and because the costs of waste management are spread fairly among all waste producers, only incidentally burdens interstate commerce.

Thus, the only question left to address is whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." As discussed above, no hearing has been requested and no factual findings made as to the effect of Oregon's $1.40 per ton differential on the flow of interstate commerce. On this record, petitioners cannot argue that the fee recovers any more than out-of-state waste's fair share of costs incurred by Oregon or imposes an unreasonable burden on interstate commerce. The procedural course chosen by petitioners limited them to a facial challenge to the constitutionality of the statute and rules and there are thus no factual findings that would allow them to prove that the fee is "manifestly disproportionate" to the services rendered. *Clark v. Paul Gray Co.*, 306 U.S. 583, 599 (1939). Moreover, the cases are clear that the burden of proving that the fee is excessive is on the party challenging the fee. *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*, 405 U.S. at 719-20; *Clark v. Paul Gray*, 306 U.S. at 600; *Ingals v. Morf*, 300 U.S. 290, 296 (1937).[19]

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[19] Two aspects of the Oregon fee limit the possibility that it can ever be applied abusively to out-of-state interests. First, since the fee is imposed only on waste dumped in Oregon, the event cannot be taxed by any other state. Thus, there is no danger of the multiple taxation by various states that has led to the Court to condemn some state taxes and fees. *Compare American Trucking Associations v. Scheiner*, 483 U.S. 266, 291-92 (1987) (noting danger of multiple taxation of interstate trucking; flat tax held invalid) *with Commonwealth Edison Co. v. Montana, supra* (coal severance tax upheld; no possibility of multiple taxation); and *Goldberg v.*

The benefits to Oregon of a funding mechanism that enables it to recapture all of its costs associated with in-state disposal of non-resident waste cannot be overstated. This Court's decisions repeatedly have recognized the benefit to a state in allowing the state to recover interstate commerce's "fair share" of the costs associated with interstate commerce's use of local services and resources. *See Commonwealth Edison,* 453 U.S. at 620; *Complete Auto Transit v. Brady,* 430 U.S. at 279; *Evansville-Vanderburgh Airport Authority District v. Delta Airlines,* 405 U.S. at 626-27. That is no less true in the case of a state's management of solid waste disposal. The need for adequate state funding is unquestioned. Although no hearing has been held and no factual findings have been made as to the amount of out-of-state waste brought into Oregon for disposal, it reasonably can be assumed that the amount is substantial. The amount of waste, and the added cost of its disposal, was sufficient to prompt the Oregon legislature to insist that non-residents pay the regulatory costs associated with disposing their waste in Oregon, thereby adding needed revenue to help distribute the costs of Oregon's solid waste management program among all who benefit from it.

That the non-resident fee Oregon seeks to collect relates to health and safety concerns adds force to the state's justification for requiring non-resident waste producers to pay their fair share of the costs of disposal in Oregon. Oregon is not "needlessly obstruct[ing] interstate trade or attempt[ing] to place itself in a position of economic isolation," and thus it "retains broad regulatory

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Sweet, 488 U.S. 252, 262-64 (1989) (telecommunications tax upheld; no significant risk of multiple taxation). Second, the Oregon fee is strictly limited by statute to the costs related to out-of-state waste. Thus, unlike some of the potentially open-ended sales, use, and other general taxes states impose, Oregon's fee is subject to its own internal limiting principle.

authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor,* 477 U.S. at 151. As with the State's efforts in *Sporhase v. Nebraska* to conserve ground water for public health and safety reasons, Oregon has strong justification for requiring non-resident waste producers to contribute their fair share to a regulatory program aimed at health and safety concerns.

Moreover, Oregon has legitimate reasons for structuring its in-state waste management funding scheme so that Oregon residents pay a portion of that cost through a dumping fee and the remainder through general income taxes. The Oregon legislature reasonably has decided that all Oregon residents should pay for in-state garbage disposal through income taxes, inasmuch as all Oregon residents, regardless of their individual contribution to the waste disposal problem, benefit from an efficient, healthful and effective waste disposal system. Even if Oregon could tax non-residents as a group to help fund Oregon's waste management program, it would not serve Oregon's legitimate interests to do so. The only non-residents who benefit from Oregon's regulatory program are those whose waste is brought into the State for disposal. But for those who live in Oregon or have sufficient contacts with the State to pay income taxes, the benefits that accrue broadly from Oregon's regulatory interests are both tangible and real. It makes sense—indeed, compelling sense—for the proportionate share of the costs of in-state waste disposal to be broadly distributed to Oregon taxpayers generally. Surely federal courts should not be in the position of second-guessing a State's allocation of in-state solid waste costs among in-state interests.

Oregon's interests underlying the funding structure it has adopted are legitimate and burden interstate commerce only indirectly, if at all. For these reasons, the structure does not violate the Commerce Clause.

V. OREGON'S SOLID WASTE DISPOSAL FUNDING STRUCTURE PASSES "CLOSE SCRUTINY" REVIEW.

A. Oregon Lacks Alternatives to Its Current Funding Structure That Are Adequate To Preserve Its Interests.

Petitioners claim that Oregon's solid waste disposal funding structure fails close scrutiny review because Oregon has non-discriminatory alternatives available to it. Oregon has no available alternative "*adequate* to preserve the local interests at stake," *Chemical Waste Management*, 112 S. Ct. at 2014 (emphasis added), if it is to recover the actual cost of in-state disposal of non-resident waste and retain its discretion to require that all Oregon residents, regardless of their individual contribution to the waste generation problem, contribute to funding the costs of maintaining an efficient, environmentally responsible solid waste management program.

Petitioners argue that Oregon should discontinue the use of general funds to defray a portion of the cost of managing the disposal of in-state garbage and increase the in-state fee to match the non-resident fee or, alternatively, reduce the non-resident fee to match the in-state fee. Petitioners' novel approach is not found in any of this Court's Commerce Clause or Privilege and Immunities Clause cases.[20] This Court has never held that a state

[20] In *Chemical Waste Management*, the Court suggested that non-discriminatory alternatives to the additional fee on out-of-state waste would be an equal fee on all waste, a per-mile tax on all trucks transporting waste on the roads, or an "evenhanded cap on the total tonnage landfilled." 112 S. Ct. at 2015. But these alternatives were based on and flowed directly from the Court's conclusion that Alabama's sole concern was reducing "the volume of the waste" entering the facility. *Ibid.* As the Court explicitly recognized, Alabama either could not or did not show that the fee on out-of-state waste was based on costs or that in-state interests, even though not subject to the fee, were nevertheless paying the appropriate costs of

could be required to change its funding mechanism to avoid "discrimination," at least where economic protectionism is not present. Oregon's funding, in effect, uses some general fund monies, collected from all taxpayers, to reduce the direct cost imposed on garbage producers. This Court's decisions do not prevent a state from using such funds solely for the benefit of state residents. *See Philadelphia v. New Jersey*, 437 U.S. at 637 n.6; *New Energy Co. v. Limbach*, 486 U.S. at 278.

Petitioners' "non-discriminatory" alternatives to Oregon's current funding system pose serious obstacles to Oregon's accomplishment of its goals. If the fee on in-state waste must be raised so that all costs of handling that waste are recovered through that fee alone, Oregon is precluded from spreading part of the cost of in-state solid waste among all of its residents and others who directly benefit from the state's waste management program, regardless of their individual contribution to the problem. Alternatively, if the fee on out-of-state waste were reduced to the level of the in-state fee (the approach petitioners undoubtdly would prefer), out-of-state waste would pay less than the costs of Oregon's regulatory program that are attributable to the disposal of that waste within Oregon's borders. In effect, Oregon taxpayers would be forced to subsidize out-of-state waste disposal. Clearly, that result is not constitutionally required; interstate commerce can be made to pay its own way. *See, e.g., Commonwealth Edison*, 453 U.S. at 623-24.

The impact of raising the in-state garbage fee to $2.25 per ton, which would cure any Commerce Clause problem

the state's solid waste regulatory programs. 112 S. Ct. at 2016 and n.9. The fee on out-of-state waste in that case was, in fact, blatantly discriminatory, unrelated to cost, and imposed in order to make out-of-state waste bear the entire burden of the state's goal of reducing volume. In contrast, Oregon's fee is based only on the cost of disposing of out-of-state waste, requires out-of-state waste to pay only its fair share, and is balanced by fees and taxes the state imposes on in-state waste and state residents.

(see OWS Br. 19-20), further underscores the superficial nature of petitioner's claim that Oregon's $1.40 per-ton surcharge burdens interstate commerce. An increase in the in-state waste disposal fee would have absolutely no impact on the free-flow of out-of-state garbage into Oregon landfills. *Cf.* OWS Br. 22 ("[T]he purpose of the Commerce Clause [is] to ensure the free flow of interstate trade.") The cost imposed on out-of-state waste would be exactly the same as it is now. Then, as now, out-of-state waste would be welcome in Oregon. There would be no change in the cost advantages or disadvantages of Oregon landfills compared to those of other States as a final resting place for out-of-state garbage. Necessarily, then, it is the fact of the surcharge, not the differential, that creates whatever incidental burden rests on interstate commerce. But *the fact* of the surcharge, standing alone, implicates no interest with which the Commerce Clause is concerned.

Significantly, the Court's examination of possible alternatives to a discriminatory fee on interstate commerce focuses on the availability of alternatives "adequate to preserve the local interests at stake." *Chemical Waste Management v. Hunt,* 112 S.Ct. at 2014. Nondiscriminatory alternatives are almost always available; the question is whether they are adequate. As explained above, the "nondiscriminatory" alternatives available here—lowering the out-of-state fee or raising the in-state fee—are inadequate. Oregon's allocation of in-state costs legitimately promotes its state regulatory policy; petitioners' suggested non-discriminatory alternatives do not. In short, applying the Commerce Clause test, no "nondiscriminatory" alternative to Oregon's current funding approach adequately preserves Oregon's interests.

Moreover, in the three Privileges and Immunities Clause cases addressing disparate non-resident fees discusesd earlier (*ante,* pp. 30-31), this Court did not so much as hint that a disparate non-resident fee that a state sought to justify based on a general fund subsidy of the in-state fee would fail the less restrictive alternative requirement on the basis that the state always had the option of increasing the in-state fee to match the non-resident fee. Indeed, in all of those cases, the Court intimated that disparate fees clearly would satisfy the constitutional test if the in-state fee were lower because general fund revenues subsidized in-state costs.

Finally, this case presents a particularly compelling example of a state policy choice that should not be lightly struck down. State flexibility in structuring the financing of in-state waste reduction and disposal costs is consistent with federal law. This court has recognized that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." *Philadelphia v. New Jersey,* 437 U.S. at 620 n.4, *quoting* 42 U.S.C. Section 6901(a)(4) (1976 ed.). It would be strange indeed to deprive the states of discretion in determining how to meet this congressional mandate on the basis of an amorphous and unsubstantiated claim of harm to interstate commerce. Moreover, since this case concerns "dormant" commerce clause matters, any widespread abuses by the states could be remedied by federal legislation. *See Prudential Ins. Co. v. Benjamin,* 328 U.S. 408 (1946).

B. Out-of-State Interests Properly Can Be Made To Pay Their Fair Share of a State's Costs Where Goods in Direct Competition Are Not Involved and Interstate Commerce Is Not Asked To Bear the Brunt of Oregon's Regulatory Efforts.

Petitioners argue that Oregon cannot justify its disparate in-state and out-of-state garbage disposal fees by asserting that "intrastate commerce pays its "fair share of the relevant costs through general revenue measures." *See, e.g.,* OWS Br. 23-26. Petitioners rely on compensatory tax cases, such as *Maryland v. Louisiana,* 451 U.S. 725 (1981), where the Court has required that taxes or

fees be (1) imposed on individual in-state and out-of-state products or entities in equivalent amounts and (2) based on substantially equivalent events. In the compensatory tax area, this Court has sought to ensure that when interstate products or businesses compete with local products or businesses, the comparative dollar amounts of taxes or fees do not result in a competitive advantage for in-state products. Thus, a State with a sales tax may impose a non-discriminatory use tax on goods purchased out-of-state and used in the state in order to preserve revenues and prevent diversion of purchases. But a discriminatory use tax that, in effect, gives an advantage to local business violates the Commerce Clause for the same reason any other economic protectionist measure does. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) (non-discriminatory use tax upheld); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) (discriminatory use tax held invalid).[21]

Petitioners' reliance on compensatory tax cases is misplaced. When resource conservation, as opposed to economic competition, is at issue the fair share focus is different. The Commerce Clause concern here is not direct competition in the sale of goods, but whether a state requires out-of-state users of the resource to bear the brunt of supporting local conservation efforts or erects barriers to the use of the resource. Thus, a State's efforts to protect a state resource by closing its borders to interstate commerce are generally invalid, *see, e.g., Hughes v. Oklahoma*, 441 U.S. 322 (1979) (ban on export of minnows); *Philadelphia v. New Jersey, supra.* On the other hand, a State's efforts to spread the burden to in-state and out-of-state interests alike do not violate the Commerce Clause. *See, e.g., Sporhase v. Nebraska, supra.*

[21] Petitioners also rely on *American Trucking Assn. v. Scheiner*, 483 U.S. 266 (1987) for the proposition that a higher fee imposed on interstate commerce cannot be justified by other taxes paid by in-state interests. OWS Br. 24. But in *Scheiner*, the Court found that the flat tax on motor vehicles in fact discriminated against out-of-state vehicles "by subjecting them to much higher charges per mile traveled in the state," and did "not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads" by out-of-state vehicles. 483 U.S. at 290.

A state cannot then finance local conservation efforts on the backs of out-of-state users, but it may ask them to contribute their fair share. That share is the additional cost to the state that the out-of-state resident's use of the local resource causes the state to incur. The focus in the resource use context is not on the extent of the burden imposed on each individual in-state user of the resource, and whether that burden matches the individual out-of-state user's burden. *See Sporhase v. Nebraska*, 458 U.S. at 955-56. Rather, it is on whether the state's collective contribution to protecting or preserving the resource, however that contribution is drawn from in-state interests, is adequate to fund the State's proportionate share of the cost of conservation.

This Court's cases teach, then, that where resource conservation is at issue, the focus is two-fold: (1) whether the state imposes sufficient costs and burdens on in-state interests to achieve the conservation benefits that are provided to state residents; (2) whether the amount of the out-of-state user's contribution is based on the additional cost imposed on the state in allowing the out-of-state user to avail itself of the in-state resource.

Oregon, through a combination of in-state user fees and general fund revenues, pays the full regulatory disposal costs for garbage produced and disposed of in-state. The out-of-state fee is based on the additional cost which the state incurs by out-of-state waste's disposal in Oregon. By virtue of the express nexus to actual costs, Oregon necessarily asks only that out-of-state waste bear its proportionate share of the costs of using Oregon's landfills. The Commerce Clause does not require Oregon to accept less. Accordingly, even if this Court concludes that "close

scrutiny" is appropriate in analyzing Oregon's solid waste funding scheme, that scheme meets the challenge that test imposes.

VI. TO THE EXTENT PETITIONERS CONCEDE THAT A COST-BASED SURCHARGE MAY IN SOME CIRCUMSTANCES BE PERMISSIBLE, AND THEY INSTEAD ATTACK ONLY ASPECTS OF OREGON'S FEE, THE COURT'S REVIEW SHOULD GO NO FURTHER.

Having vigorously contended that Oregon's cost-based fee, on its face, violates the Commerce Clause, petitioners —sometimes abruptly and sometimes subtly—shift course and embellish their challenge with detailed "factual" arguments about the components of the fee and its impact. *E.g.*, OWS Br. 26-31; CRC Br. 23-34. Petitioners evidently seek to transform their claim, if necessary, into an "as applied" challenge. They argue that certain of the regulatory expenses Oregon recovers with the fee are outside the scope of what the Commerce Clause permits, and that in fact Oregon's surcharge is protectionist in purpose and effect. They thus implicitly retreat from their position that *any* cost-based fee greater than the fee on in-state waste is *per se* invalid, and their arguments at that point become fact-bound. Specifically, petitioners attempt to assert that in fact Oregon's fee restricts the flow of waste across Oregon's borders, and that in purpose and effect it benefits in-state interests by preserving Oregon landfill capacity for Oregonians. Petitioners also factually attempt to dissect Oregon's fee, its various components, the justifications for it, and the manner in which it recoups regulatory expenses that, petitioners believe, are not among the costs a State should be permited to collect. Petitioners' belated claims need not and should not detain the Court. Petitioners have waived these arguments, both by the procedural route they took through state court, and by the arguments they abandoned and failed to raise along the way.

A. Petitioners Have Abandoned Any Claim That the Surcharge in Fact Is Protectionist in Purpose or Effect.

Petitioners proceeded through the state courts on the simple (and simplistic) theory that any facial disparity in the fee rendered it *per se* subject to strict scrutiny and that no inquiry into the effect of the fee was permitted, much less required. Now, however, petitioners spice their arguments with a wide array of fact-based assertions about the "protectionist" effect of Oregon's surcharge.[22] They do so after having disclaimed below, unequivocally, that any inquiry into the actual effect of Oregon's fee on out-of-state commerce is foreclosed by this Court's jurisprudence, which petitioners argued, treats any facially disparate treatment of in-state and out-of-state waste as "discriminatory," thus requiring strict scrutiny.[23] The proce-

[22] The most flagrantly fact-based of the assertions are contained in CRC's brief, which argues, for example, that: Oregon is giving its citizens a "misconceived priority over the State's landfill capacity" (CRC Br. 15); Oregon is engaged in economic protectionism because the fee "has the effect of saddling those outside Oregon with a disproportionate burden of conserving Oregon's landfill capacity" (CRC Br. 16); the purpose of Oregon's surcharge "is the preservation of landfill capacity for Oregonians," and it will "plainly have that effect" (CRC Br. 16). OWS is more subtle in trying to suggest the same problems: "intrastate waste is exempt from the burden [placed on the disposal of out-of-state waste]" and thus in-state waste does not have to "compensat[e] the State for *all* of the costs associated with waste disposal" (OWS Br. 20); the fact that in-state waste generators do not absorb a fee placed on out-of-state generators "means, necessarily, that in-state generators will have an economic advantage in competing for Oregon waste disposal capacity " (OWS Br. 23).

[23] That basic theme permeated OWS's briefing throughout the state court proceeding. OWS relegated to a footnote its response to the State's arguments on the importance of a showing of actual impact on interstate commerce interests. *E.g.*, OWS Pet. for Or. Sup. Review, 11-12, n.3. CRC never briefed the federal Commerce Clause issues independently in the state courts; rather, it always

dural route of review petitioners invoked required the rule to be considered in isolation. That narrow procedure was consistent with petitioners' theory and with their strategy, for petitioners sought not only to deny the relevance of an inquiry into the relative burdens and costs on in-state and out-of-state interests, but also to deprive the State of the opportunity to defend its rule on the basis that there was no discriminatory impact on interstate interests *in fact*.[24]

If, as the State consistently has argued, the relative burdens on in-state and out-of-state commerce must be realistically examined to determine whether a disparate *cost-based* fee on out-of-state waste disposal is "discriminatory," then petitioners are foreclosed from their fact-based assertions that the rule has an actual protectionist effect. Those are new claims that were not raised below, were not within the state courts' power to examine, and cannot be examined on the record before the Court. Petitioners, having chosen a narrow path of review and having disclaimed that anything more than the face of the rule should be examined, are in no position to complain if the examination stops there.

"adopted and incorporated" OWS's position. Ironically, it is CRC that now presses fact-based protectionist arguments particularly beyond anything ever argued in the lower courts.

[24] As discussed earlier, petitioner CRC brazenly asserts that "the limited form of judicial review authorized by Oregon's Administrative Procedures Act disabled, in large part, the State from factually justifying its discriminatory treatment of foreign waste." CRC Br. 13-14. The State, in its response to the petitions for certiorari, pointed out the limitations of the procedure below and the ways in which they might render review in this case less merited. Resp. in Opp. to Cert. 3-5, 8-14. Petitioner OWS accused the State of trying to run a "squeeze play" which would hamper them in their efforts to achieve a full adjudication of their claims. OWS Reply to Resp. in Opp. to Cert. 2. If a "squeeze play" is at work, petitioners, not the State, executed it.

B. Petitioners Have Waived Their Fact-Based Challenges to the Components of the Fee.

In similar fashion, petitioners now press challenges to certain of the components of Oregon's cost-based fee, in addition to facially attacking the fee as a whole. Only two of their challenges were presented below. Specifically, petitioner OWS argued that to include "lost disposal capacity" and pollution tax credits in the fee violated the Commerce Clause.[25] The Oregon Court of Appeals rejected those arguments, holding that they were not within the scope of the court's review. *Gilliam County v. Dept. of Environmental Quality*, OWS Pet. Cert. App. 25a n.6. None of the other challenges to the components of the fee that petitioners now make were raised below. Of equal significance, when petitioners sought review in the Oregon Supreme Court, they abandoned altogether their few challenges to the calculation of the costs.[26]

Petitioners largely disregard the posture in which they find themselves. At this juncture, either their claims cannot be resolved in this proceeding (as the Oregon Court of Appeals concluded), or they have been abandoned, or both. It is fundamental that petitioners cannot come before this Court making new challenges that they never presented in any form to either lower state court, nor is it obvious why they believe they are entitled to by-pass the Oregon Supreme Court altogether with the limited

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[25] OWS Opening Br. (Oregon Court of Appeals) 31-34. CRC adopted and incorporated those arguments by reference, as it did with all of OWS's federal arguments. CRC Opening Br. (Oregon Court of Appeals) 13.

[26] *See generally* OWS Pet. for Sup. Ct. Rev. Again, CRC did not make any independent federal law arguments, but merely adopted and incorporated all of OWS's arguments. Thus, neither petition raised any concern about the calculation of the costs or the manner in which the Oregon Court of Appeals had resolved the two claims on that point that OWS raised.

claims that they half-heartedly pressed in the Oregon Court of Appeals.[27]

C. The Record Before the Court Provides an Inadequate Basis To Test the State's Calculation of Its Surcharge.

Petitioner CRC ignores the problem created by petitioners' failure properly to present and preserve their challenges to the State's calculation of the costs. Petitioner OWS glosses over the problem, apparently willing to concede as a state law matter that their challenges to the actual calculation of the fee could not be reached below, but asserting cavalierly that the fact that the state courts did not feel free to examine the record and resolve these claims "of course" does not bar this Court from doing so. OWS Br. 26.[28] The notion that this Court will so readily disregard state jurisdictional and procedural limitations is novel at best; the Court more frequently accords state processes considerable deference and respect.[29] Even assuming the Court would not be bound by the limits on the state courts' review, what petitioner

[27] *See generally Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (explaining reasons for requirement that federal question be properly raised in state court proceedings).

[28] It is worth repeating that the Oregon Supreme Court did not even have the opportunity to consider whether, as petitioner OWS asserts, "state procedural rules * * * barred the Oregon Supreme Court" (OWS Br. 26) from reaching these arguments, since OWS did not show the state's highest court the courtesy of asking it to consider those claims.

[29] Federal questions generally must be pursued in state courts through the procedures and with the degree of specificity required by state rules of practice. *See Beck v. Washington*, 369 U.S. 541, 549-54 (1962). "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585 (1913).

OWS ignores is that the record was not constructed for purposes of substantively testing DEQ's rule, and it does not contain the evidence that the State would be entitled to present if petitioners sought through any other state or federal forum to deconstruct the fee.

To be sure, the record here contains many documents that tend to demonstrate, at least partially, the basis on which DEQ selected the particular cost figure it adopted by rule. But nothing in Oregon's administrative procedures act requires that the record placed before the Oregon Court of Appeals be a complete showing of what the agency did and why. As already discussed, the documentation contained in the record is a compilation of what the agency made available to the public to provide an opportunity for public hearing and comment. This documentation is "the record" on review only for purposes of showing *procedural* compliance with rulemaking requirements. After public hearings on a rule, an Oregon agency may dramatically alter its proposed rule with no further public hearing and no further documentation that would become part of the record submitted to the Court of Appeals in a rule challenge proceeding under Or. Rev. Stat. § 183.400. Similarly, following the public hearing, an Oregon agency may reexamine the proposed rule and, for reasons not a matter of record, may conclude that the substance of the rule should remain the same. Procedurally, nothing in Oregon law precludes post-hearing deliberations as part of the process of adopting administrative rules. Necessarily, then, the record that comes before the Oregon Court of Appeals to show *procedural* compliance with rulemaking requirements is by definition an inadequate basis to examine the substantive validity of the rule, for it does not contain documentation of anything the agency considered in its internal deliberations after the close of the public hearing. It is for that reason that the Court of Appeals is foreclosed statutorily from examining whether there is "substantial evidence" to support the agency's rule, or from making any other examination of substantive validity that goes beyond the rule's face.

No record yet exists from which that examination reliably can be made. *See also* n.6, *ante*.

Other forums and procedures therefore must be invoked. A challenge to the substance of a rule may be brought in Oregon circuit court, which permits a full evidentiary hearing and which would result in fact-finding by a state trial court. Similarly, a federal court suit would permit petitioners to wage a direct attack on the manner in which Oregon has calculated the fee on the theory that some of the components cannot constitutionally be included. Indeed, petitioners have already brought state and federal court lawsuits in which their claims can be raised and litigated.[30] They have suggested no reason why the limited record before the Court—which is documentary only, and does not contain a full presentation of evidence, testimony and cross-examination of witnesses, or other features of a traditional *adjudicatory* proceeding—should be deemed a fair or adequate basis on which to test DEQ's calculation of Oregon's fee. Nor have petitioners given any sound reason why this Court should engage in *de novo* review of the limited record before it and place itself in the position of making factual findings in the first instance.[31] If petitioners wish to base their case on assertions that some components of Oregon's surcharge do not represent true "costs" (OWS Br. 28-29; CRC Br. 23-26) or that the fee discriminates in effect because in-

[30] *See* Resp. Br. in Opp. 14, n.11 discussing the state and federal court lawsuits petitioners have pending.

[31] As petitioners reluctantly concede (OWS Br. 26, n.11), at most, the case should be remanded to the Oregon Supreme Court so that a state court may review the record in the first instance. Of course, to do so would plainly ride roughshod over the Oregon legislature's limited grant of jurisdiction to the Oregon appellate courts and the probable reluctance the state courts will have in engaging in fact-finding based on a record ill-suited to the inquiry. It is difficult to understand why this Court should accept either of petitioners' invitations (to engage in fact-finding, or to coerce the state courts into doing so) when they can and have filed other lawsuits in which their challenges can be resolved.

state waste does not "pay" the same "costs" (OWS Br. 28-30; CRC Br. 31-34), they must allege and prove those facts before an appropriate factfinder in a forum adequate to address them.[32] Their effort to make those arguments at this late hour, and in the context of this narrow proceeding, should be rejected.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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[32] Although the record is not adequate to resolve petitioners' attacks, it does demonstrate the fact-intensive nature of the issues and the need for a full evidentiary hearing and fact-finding. For example, petitioners assail the "environmental liability" component of the fee, arguing that such liability "is not a certainty," so no cost for it can be recovered. CRC Br. 25. Any buyer of insurance—or any self-insurer—knows that potential liabilities impose costs, even if they are difficult to measure. Many of petitioners' objections are similar, and reflect a crabbed view of "costs" that finds no support in the law, in economic theory, or in sound policies of waste management. *See generally* Coase, "The Problem of Social Cost," 3 J.L. & Econ. 1, 44 (1960) ("The cost of exercising a right (of using a factor of production) is always the loss which is suffered elsewhere in consequence of the exercise of that right—the inability to cross land, to park a car, to build a house, to enjoy a view, to have peace and quiet or to breathe clean air.").

(10) (1)

Nos. 93-70 and 93-108

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC. and
GILLIAM COUNTY, OREGON,
Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,
Respondents.

COLUMBIA RESOURCE COMPANY, L.P.,
a Washington limited partnership,
Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

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REPLY BRIEF OF PETITIONER COLUMBIA RESOURCE COMPANY, L.P.

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Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

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REPLY BRIEF OF PETITIONER COLUMBIA RESOURCE COMPANY, L.P.

INTRODUCTION

The Oregon Supreme Court's decision upholding Oregon's imposition of a surcharge exclusively on foreign waste saddled the State with an uncomfortable dilemma; one its forty nine pages in response illuminates. The Oregon court upheld the surcharge because of its express nexus to "costs" incurred by the State in the administration of its solid waste program. (Pet. App. 26.) Through-

out, however, the State has recognized that the Commerce Clause requires more—that intrastate commerce be similarly burdened. To that end, the State, in quintessential ad hoc fashion, formulated from the outset its "income tax equalizer" argument. Unfortunately for the State, though, the Oregon court pretermitted that argument, leaving the State with a problem on certiorari: A favorable result that is the product of indefensible constitutional reasoning. The State resolved its quandary the only way it could. It abandoned the Oregon Supreme Court's reasoning, electing instead to stage an independent defense of the surcharge. Thus, on page 49 of its response, the State offers its first, last and only statement in support of the Oregon Supreme Court's analysis, "[t]he judgment of the Oregon Supreme Court should be affirmed."

On this one point, then, at least, the parties seem to agree: The Oregon court incorrectly decided the case and its reasoning should no longer detain this Court.

With the Oregon court's reasoning for all intents and purposes removed from the equation, the State attempts to reduce the dispute [1] to one testing its claimed prerogative to finance the State's solid waste program with a transaction tax on nonresidents and an income tax on residents. To some, the State's equalized tax burden justification may appear superficially attractive; to complete the appearance, however, the State must convince the Court that its bifurcated scheme does not discriminate against interstate commerce, facially or practically. To do that, the State creatively reworks this Court's Commerce Clause teaching, occasionally dismissing it altogether. For example, according to the State, solid waste is a mere quasi commodity, resource protectionism is less abhorrent to the Constitution than other forms of parochial protectionism, disparate tipping fees produce no market impact,

[1] It should not go unnoticed that the State offers no substantive response to petitioner's claims of protectionist purpose and effect, instead relying on a series of procedural objections calculated to divert the Court's attention away from those claims.

and petitioner failed to preserve all its arguments regarding protectionism. Fortunately for petitioner, only a State distracted by its inclination to discriminate in favor of local residents would be fooled by such claims.

THE LEGAL TEST IS NOT COMPLEX: IF THE SURCHARGE OREGON IMPOSES EXCLUSIVELY ON FOREIGN WASTE IS DISCRIMINATORY, OREGON MUST SHOW A LOCAL BENEFIT THAT CANNOT BE ADEQUATELY SERVED BY A NONDISCRIMINATORY ALTERNATIVE.

The prevailing constitutional standard testing the validity of state laws under the Dormant Commerce Clause has been so long settled it is axiomatic. Where a local enactment discriminates against interstate commerce on its face or in practical effect, the burden falls on the state "to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). Because demise of the surcharge is so intuitively apparent under this standard, the State presents an unabridged assault on the standard's greatest feature—its simplicity—and hopelessly confuses the analysis. Before bringing the State's eccentric analysis back to center, though, petitioner offers three comments on context it might earlier have thought likewise axiomatic.[2]

[2] Both the State and amici curiae decry petitioner's reliance on *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992), as analytically controlling, with amici's disagreement sufficiently enthusiastic to cast petitioner's reliance as "border[line] frivolous." Br. for *Amici Curiae*, p. 13 n.13. The State and amici, relying on a *Chemical Waste* footnote, believe this Court expressly reserved for another day judgment on the propriety of a cost based surcharge. *See Chemical Waste*, 112 S. Ct. at 2016 n.9. That is not what footnote 9 says. The Court noted only that Alabama presented no argument, as it did below, that its $72 assessment was a compensatory fee or tax, noting further that both arguments were summarily rejected by the trial court. The implication is not that the Court wished to reserve the compensatory fee question, but

Despite this Court's pronouncements to the contrary in *Ft. Gratiot Landfill v. Mich. Dept. of Nat. Res.*, 112 S.Ct. 2019 (1992); *Chemical Waste; and Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the State has the temerity to characterize solid waste as quasi commercial: "Petitioners too quickly assume that solid waste can be equated with consumer goods that are actively bought and sold in a competitive market environment." *Br. for Resp.*, p. 16. Later revisiting the theme, the State writes, "[solid waste] is not a commodity that is sold in the market place; rather, it is disposed of at a cost. * * * Local businesses simply do not compete with out-of-state businesses in the sale of garbage." *Id.* at 26. The State's effort to deflect Commerce Clause scrutiny away from its surcharge on foreign waste finds support nowhere in this Court's cases and the State cites none. The State's effort also reflects its fundamental misunderstanding of the warring interests driving this dispute. Whether waste generators compete with one another for sale of their "product" is debatable; it is also, though, entirely irrelevant. Viewed through the lens of the Commerce Clause, the relevant commodity is not only waste but, more important, landfill capacity. And the relevant competitors are not interstate "sellers" of waste but, rather, interstate consumers of that landfill capacity.[3] Therefore,

> [w]hether the business arrangements between out-of-state generators of waste and the [instate] operator of a waste disposal site are viewed as "sales" of garbage or "purchases" of transportation and disposal services, the commercial transactions unquestionably have an interstate character. The Commerce

rather that not even Alabama thought the compenstaory fee issue worth raising.

[3] Actually, the State's claim that no commercial market in waste exists is not just an analytical misfire, it is also wrong. Competition among landfill operators for greater shares of waste flow is fierce. Such has been the market reality since the privatization of waste disposal. Hopefully, the State recognizes this.

> Clause thus imposes some constraints on [the State's] ability to regulate these transactions.

Ft. Gratiot, 112 S. Ct. at 2023. Accordingly, the Court expressly declined to exempt solid waste from constitutional protection. *Id.* at 2023 n.3. To the extent, therefore, the State stops short of an exemption and asks the Court to extend just a little less protection to waste, the State asks this Court to dismiss the import of its unequivocal precedent.

Also, although not clearly discernible, the State appears to argue that resource protectionism is somehow less odious under the Commerce Clause than economic protectionism. *Br. for Resp.* pp. 25-30. For example, at page 28, the State observes, "[p]rotection of state resources is not an illegitimate purpose or effect; it simply cannot be achieved through the illegitimate means of forcing out-of-state waste to bear the burden, when instate waste does not." While this is another way of saying that conservation efforts may not discriminate, the State unmistakably intimates a qualitative difference between resource and economic protectionism.[4] "States," however, "may not compel the confinement of the benefits of their resources * * * to their own people whenever such hoarding and confinement

[4] The State places considerable, indeed almost exclusive, emphasis on *Sporhase v. Nebraska*, 458 U.S. 941 (1982), portraying it as an analogous differential regulation case. First, a requirement that ground water extraction be "reasonable" and "not contrary to * * * conservation" is not analogous to different taxes. Second, to whatever extent this Court sanctioned exceptional treatment of foreign consumers in that case, the result is an aberration in the water conservation context which should have no bearing on landfill space:

> [A]lthough appellee's claim to public ownership of Nebraska's ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership *of other natural resources.*

Id. at 956-957 (citations omitted) (emphasis supplied).

impedes interstate commerce." *Hughes v. Oklahoma*, 441 U.S. 322, 336 n.15 (1979). Insofar as the State subtly solicits deference because it is protecting a local resource, the State asks the Court to grant reciprocally less deference to its own precedents.

Finally, the State does its best to convert petitioner's Commerce Clause challenge to a Privilege and Immunities challenge. *See, e.g., Br. for Resp.*, pp. 17-22. The State's very reference to the Privilege and Immunities Clause highlights its inability to find support in the Commerce Clause. Moreover, the authority cited does not support the accompanying propositions.[5]

All that really remains is to determine whether the State's surcharge discriminates against interstate commerce and, if so, whether the State can justify such treatment.

A. The Surcharge Discriminates Against Interstate Commerce.

1. *Contrary to the State's Contention, a Comprehensive Examination into Oregon's Tax Structure Need Not Precede a Finding of "Facial" Discrimination.*

The State takes issue with petitioner's view that a disparate fee, without more, constitutes facial discrimination. *Br. for Resp.*, p. 22. Petitioner and the State suffer a fundamental disagreement over the meaning of "facial." Given the equalized tax burden rationale upon which the State relies, it predictably maintains that a tax law is not "facially" discriminatory unless the court peers behind the statute and parses through a state's entire scheme of taxation to learn whether disparate treatment ultimately works to the disadvantage of some protected group.[6] Petitioner, conversely, considers the surcharge facially discriminatory because it singles out foreign consumers of Oregon landfill capacity for exceptional treatment.[7] The thrust of the State's argument on this issue, and indeed the thrust of the State's entire defense of the surcharge, is that the surcharge is not facially discriminatory because Oregonians supplement their contributions to the solid waste program via income taxes in an amount sufficient to equalize the burden.

First, the State asks this Court to accept that proposition on faith. The statutory scheme itself, however, explicitly belies the State's claim. Certain "cost" components of the surcharge are not mitigated through income taxes. "Cost" components such as "loss of quiet enjoyment," reimbursement for tax credits, lost disposal capacity, and a risk premium for unfunded environmental liability are not collected through domestic tipping fees either. *See* ORS 459A.110 and 459A.120. It is just not true, then, that Oregonians pay an equal amount through a tax combination.[8]

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[5] For example, beginning at page 30, the State offers a series of Privilege and Immunities cases to show that disparate fees should not be subject to strict scrutiny under the Commerce Clause. Disparate treatment matters under the Commerce Clause because discrimination triggers strict scrutiny. Scrutiny under the Privilege and Immunities Clause, on the other hand, is triggered where the activity involved is "basic and essential." *Baldwin v. Fish & Game Com'n of Mont.*, 436 U.S. 371, 387 (1978). The authority is therefore inapposite.

[6] To support this proposition, the State cites *Maryland v. Louisiana*, 451 U.S. 725 (1981)—a compensatory tax case. Interestingly, several pages later, the State writes that "[p]etitioner's reliance on compensatory tax cases is misplaced." *Id.* at 40. More interesting still, the State writes this in spite of amici's virtually exclusive reliance on compensatory tax cases. *See, e.g., Br for Amici*, p. 13. Such fragmented reasoning illustrates the catch as catch can defense of the surcharge.

[7] Professor Regan, in his frequently cited article *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, explains that a per se rule against explicitness prevails. 84 Mich. L. Rev. 1091, 1148 (1986). In other words, distinctions by state line denominate a law as facially discriminatory.

[8] Incidentally, the State's characterization of these "costs" as *regulatory* is dubious. For example "loss of quiet enjoyment" and unfunded environmental liability, among others, are not regulatory costs at all because they have no relation whatever to administra-

Second, the State's claim that a facial inquiry entails a comprehensive examination of Oregon's tax structure to learn whether, ultimately, it practically discriminates against interstate commerce would diminish the Court's discrimination test. Strict scrutiny is triggered whenever a state law discriminates on its face *or* in practical effect. *Hughes v. Oklahoma,* 441 U.S. 335, 336 (1979). The State's suggestion reduces that two pronged inquiry to just one because every such examination would need to determine whether the law practically and finally discriminates. The interpretation saps the term "facial" of any substantive meaning. The Court should decline the State's invitation to render half its test superfluous.[9]

And third, the State's suggestion that its entire scheme of taxation must be examined relies upon a case incompatible with this context. In *Maryland v. Louisiana,* 451 U.S. 725 (1981), a First Use Tax was designed, in part, to equalize competition between Louisiana natural gas subject to a local severance tax and gas severed elsewhere not similarly subject to the local tax. *Id.* at 732. Indeed, this is the principal mission of a compensatory tax: To counterbalance the anti-competitive impact of a revenue device on the local economy. *See, e.g., Henneford v. Silas Mason Co., Inc.,* 300 U.S. 577 (1936) (compensatory use tax designed to place local retailers on competitive par with foreign retailers not subject to state sales tax).

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tive manpower or programs. It is arguable whether these are even "costs," but if so, they are certainly not regulatory.

[9] Amici also misapprehend the term facially *discriminatory* when they cite authority elucidating the term facially *invalid.* Amici maintain that petitioner must show the surcharge unconstitutional in every conceivable circumstance to prove the surcharge facially invalid. *See Br. for Amici,* pp. 9-10 (citing various First Amendment "overbreadth" cases). Facial invalidity is analytically distinct from facial discrimination. Petitioner maintains that the surcharge is discriminatory on its face and, if not unconstitutional per se, therefore subject to this Court's strictist scrutiny. *Hughes,* 441 U.S. at 337.

By definition, therefore, a compensatory tax rationale requires the court to examine separate tax schemes for equality. There is nothing about Oregon's surcharge suggesting that it was designed to effect a competitive balance; in fact, by the State's own admission, the surcharge is ostensibly designed to recover costs. *See* ORS 459.298. The legislation's object, therefore, was not to restore competition but to secure funding; consequently, the State is not entitled to a comprehensive assessment of Oregon's tax structure. With no reason for a comprehensive examination of Oregon's tax structure, the Court should, instead, follow the course adopted for taxes generally in *American Trucking Assn. v. Scheiner,* 483 U.S. 266, 289 (1987):

> Implementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing state on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens.

(Quoting J. Hellerstein, 1 State Taxation: Corporate Income and Franchise Taxes, par. 4.125[5], pg. 150 (1983)).

The fundamental question is whether a formal distinction is sufficient to activate the label "facially discriminatory" or whether the measure must evince substantive protectionism before being so coined. *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984) provides the answer. West Virginia's Supreme Court upheld that State's gross receipts tax because domestic manufacturers, although exempt from the gross receipts tax, paid a higher manufacturing tax thereby offsetting an apparent burden on nonresidents. *Id.* at 641. This Court rejected the West Virginia court's compensating tax rationale, concluding that, "on its face," the gross receipts tax discriminated against interstate commerce by treating differently two companies selling tangible property at wholesale in West Virginia "depending on whether the taxpayer conducts manufacturing in the State or out of it." *Id.* at 642.

Correspondingly, despite the State's claim here that the burden born by foreign generators of waste is offset through income taxes, the surcharge scheme treats two consumers of landfill capacity differently depending on whether the consumer generates waste in the State or out of it. The surcharge scheme is therefore discriminatory on its face.

Finally, completely apart from the question whether the Court should entertain at all the State's comparative tax burden argument, the argument itself is unavailing.

2. ***Even Assuming the State's Intent to Equalize a Burden Currently Born by Oregonians through Income Taxes and assuming that Oregonians Pay an Equivalent Amount through Tipping Fees and Income Taxes, the Split Tax Structure Nevertheless Discriminates Against Interstate Commerce in Ways the State Cannot Deny.***

Undergirding the State's defense of the surcharge is its claim that funding Oregon's solid waste program with a tipping fee on foreign consumers of landfill capacity and a hybrid tipping fee income tax on Oregonians is a funding scheme not antithetical to the Commerce Clause. But this scheme emphatically offends the Commerce Clause because it subjects foreign consumers of Oregon landfill capacity to the possibility of multiple taxation. *See Armco*, 467 U.S. at 644. The State's "income tax equalizer" argument does not consider foreign consumers of Oregon landfill capacity who earn their income in Oregon. These persons will finance the State's solid waste program twice.

For example, a citizen of Washington residing in Clark County who works across the border in Portland, Oregon, will finance more than her "fair share" of the State's solid waste program. This Washington resident pays Oregon income tax on her earnings. She will also pay $2.25 per ton to dispose of her waste, which, by way of Clark County's flow control ordinance,[10] is destined for Morrow County, Oregon. The nonresident, therefore, will pay both the $2.25 surcharge and the theoretical $1.40 per ton in Oregon income tax—a total of $3.65.[11] However, an Oregonian who disposes of his waste at the same landfill in Morrow County will pay just $.85 per ton and the theoretical $1.40 in income tax—a total of $2.25.

[10] Clark County Ordinance, Ch. 9.32.

Moreover, even assuming away this problem of double taxation, the surcharge affects waste generators differently according to state boundaries. A nonresident's tax is measured exclusively by her consumption of Oregon landfill capacity; an Oregonian's tax, conversely, is only nominally linked to consumption. While a nonresident consumer will incur $2.25 of tax liability with each additional ton of space consumed, an Oregonian incurs just $.85—a significantly disparate disincentive to the consumption of landfill capacity. Because an Oregonian's tax liability primarily fluctuates with her income and not her consumption, a nonresident is far more likely to mitigate her waste production and consequent consumption of the State's disposal space. At p. 23, the State writes, "[t]he small differential between Oregon's instate and out-of-state waste disposal fees permits only the weakest inference that out-of-state garbage producers suffer a burden that will serve as a disincentive to their use of Oregon landfills." The difference between the $.85 domestic tipping fee and the $2.25 foreign tipping fee is 265%. To say that disparity extends "only the weakest" disincentive belies reality. Indeed, DEQ itself offered elasticity calculations anticipating the surcharge. (See R.0214.)

The State may effect its avowed purpose of reducing waste production[12] by penalizing the flow of all waste

[11] Although never specifically stated, petitioner assumes that the State's reference to income taxes paid by Oregonians and "others with sufficient instate activity" is an attempt to address this argument. *Br. for Pet.*, p. 3; *see also Br. for Amici*, p. 12 n.12.

[12] At p. 4 of its response, the State maintains that as a result of its conservation efforts, "Oregon landfill capacity will be consumed more slowly—to the benefit of present and future generations of

to Oregon landfills, but by imposing a scheme that is not similarly transaction sensitive the State exports a disproportionate burden of conserving Oregon's landfill capacity. *See Philadelphia,* 437 U.S. at 629.

3. *Neither the Nature of the Proceeding, the Breadth of the Record, nor Petitioner's Posture Below Preclude a Showing of Protectionist Purpose or Effect.*

Raising the same objections this Court apparently rejected in granting certiorari, the State complains that the limited nature of petitioner's challenge precludes petitioner from proving the surcharge effectively discriminatory. *Br. for Resp.*, p. 14. On page 34 of its brief, the State offers another in an exhausting litany of references to the fact that no hearing was conducted nor factual findings made concerning the operative impact of the surcharge on interstate commerce.[13] The State so far

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Oregonians *and* present and future generations of out-of-state residents whose waste can and will be disposed of in Oregon." The statutory scheme itself reveals this statement for the unabashed ad hoc justification it is. The Oregon legislature expressly declared that "[t]he disposal in Oregon of domestic solid waste generated both outside and within Oregon will reduce the total capacity *available for disposal of domestic solid waste generated in this State* * * *." ORS 459A.105(2) (emphasis supplied). The State's decision to impose the surcharge was not so neighborly as it would have the Court believe.

[13] The State's transparent effort at relentless repetition on this irrelevant point, almost as if calculated to affect the Court subliminally, underscores the State's discomfort with the substantive issues.

The State portays petitioner's choice of procedure as calculated, suggesting that federal court, state trial court, or agency review would have been a more responsible course. On the contrary, petitioner's forum selection was the responsible course. A section 1983 action in federal district court suffered exposure to defenses including failure to exhaust administrative remedies. Alternatively, under Oregon's Administrative Procedures Act, a state trial court has jurisdiction to review a rule only after its violation as a defense to enforcement of any agency order. ORS 183.484. Finally, the administrative remedy to which the State referred in its opposition

misapprehends Petitioner's theoretical effects argument that it accuses Petitioner of staging an "as applied" challenge. *Id.* at p. 42.

Briefly, the record's failure to factually chronicle the precise effect levied by the surcharge on interstate commerce is absolutely immaterial.[14] The State's contention to the contrary belies at least a half century's worth of decisions, for time and again the Court has gleaned protectionist effect from the face of a law. For example, in *Armco,* Justice Powell employed his own hypothetical to demonstrate that West Virginia's manufacturing tax, on its face, discriminated against interstate commerce. The Court dispelled the State's concern here that the record is inadequate:

> Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a state that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. That is not the test.

Id. at 644. As if that were not sufficiently on point, Justice White wrote this about Louisiana's First Use Tax:

> It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.

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to the petition is discretionary with the agency or requires violation of the rule. ORS 183.410 ("On petition of any interested person, any agency may in its discretion issue a declaratory ruling with respect to the applicability * * * of any rule or statute enforceable by it").

[14] Due to the pendency of litigation and the effect of chapter 385, section 92, Oregon Laws 1991, the surcharge, as the State well knows, has yet to be collected.

Maryland, 451 U.S. at 759-760.[15] Evidently, the State's claim that factual findings must precede invalidation is one the Court has already entertained. The assertion has not been well taken.

The State, moreover, argues that petitioner abandoned any foray into the record in search of protectionism because petitioner challenged the surcharge on its face. *Br. for Resp.* p. 44.[16] According to the State, "[t]he procedural route of review petitioners invoked required the rule to be considered in isolation." *Id.* at 43-44. This argument emphatically cannot be reconciled with the State's earlier one that a facial review of the surcharge requires a comprehensive examination of Oregon's tax structure to determine whether, in the final analysis, the surcharge discriminates.

Finally, the State mounts a waiver argument, claiming that petitioner "cannot come before this Court making [protectionism] challenges that [it] never presented in any form * * *." *Id.* at 45. At page 19 of petitioner OWS' brief to the Oregon Court of Appeals,[17] petitioner

[15] This language was quoted later in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406-407 (1983), to support Justice Blackmun's use of an elaborate hypothetical to illustrate the constitutional infirmity of New York's preferential tax credit. *See id.* at 400-402 n.9.

[16] The State also urges the Court to ignore portions of the record dramatically illustrating its protectionist intent, *see Opening Brief for Petitioner CRC*, pp. 17-22, because, according to the State, the record was compiled not for that purpose but instead to demonstrate compliance with rulemaking procedures. *Br. for Resp.*, p. 47. The State apparently believes that record evidence, no matter how probative, should be disregarded if what the evidence proves is incompatible with why it is there. Essentially, the State asks the Court to view not just the record's depth as inadequate but that which the record offers as inadequate too. It is difficult to imagine an argument further subordinating substance to form.

[17] Because the division of work assigned petitioner OWS with responsibility for briefing the Commerce Clause issue throughout

wrote, "key legislators responsible for the passage of HB 3515 suggested that banning, or at the least, discouraging disposal of out-of-state waste may have been the purpose of the surcharge." At page 21 of the same brief, OWS maintained, "[t]his difference in treatment both discourages the use of Oregon landfills by out-of-state waste generators and requires out-of-state generators to pay for the capacity they use, solely for the benefit of Oregonians." That statement is the essence of petitioner's protectionism rejoinder to the State's equalized tax burden justification.[18] The State's claim that petitioner has not advanced its protectionism claims "in any form" is simply inaccurate.[19]

the State Court proceedings, petitioner CRC participated in those arguments by way of incorporation.

[18] Nor did petitioner renounce its protectionism arguments before the Oregon Supreme Court. Responding to the court of appeals' treatment of the surcharge, petitioner wrote,

> [t]o the extent the court meant to imply that the discriminatory surcharge is permissible because it serves the purpose of reducing the amount of waste disposed of within Oregon, the court's reasoning squarely conflicts with the U.S. Supreme Court's decision in *Chemical Waste Management, Inc., supra*, which held that a discriminatory tax cannot be justified on that basis.

Pet. OWS' Pet. for Rev. to Or. Sup. Court, pp. 17-18.

[19] As a correlate, the State argues that petitioner is not entitled to make any arguments not specifically advanced below. *Br. for Resp.*, p. 44. The State confuses new arguments with new issues. New issues, if not passed upon below, may not be raised on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). One issue in this case is whether, under the Commerce Clause, Oregon's surcharge on foreign waste discriminates against interstate commerce. New arguments supporting either side's position on the issue are not barred on appeal. *Campbell, Extent to Which Courts of Review Will consider Question not Properly Raised and Preserved—Part I*, 7 Wis. L. Rev. 91, 97 (1933). Petitioner's observations concerning the surcharge's protectionist nature, even assuming they were not articulated below, are and always have been derived from the face of the rule and the record. The State's protest, therefore, is unavailing.

Lastly, it is interesting that the State's entire response to petitioner's protectionism claims deduced from the record is confined to a series of procedural objections; the State offers nothing to rebut the substance of petitioner's arguments. To level the State's own eloquence against it: The State "invoke[s] tests rather than analysis, and * * * serve[s] results rather than principle." *See Br. for Resp.*, p. 23.

B. A Uniform Surcharge on All Solid Waste is an Adequate Nondiscriminatory Alternative to Achieve the State's Conservation Goals; the State, though, Considers it Inadequate Because it Will Impede the State's Efforts to Discriminate Against Foreign Waste.

Assuming this Court finds Oregon's surcharge discriminatory, the State maintains that its surcharge must survive nevertheless because no other scheme of taxation will allow the State to assess a transaction tax on foreign consumers of Oregon landfill capacity and, at the same time, "spread[] part of the cost of in-state solid waste among all [Oregonians] and others who directly benefit from the State's waste management program, regardless of their individual contribution to the problem." *Br. for Resp.*, p. 37.

That argument, stripped to its essence, is a claim that any other scheme of taxation will not allow Oregon to discriminate against foreign generators of waste. Petitioner has already explained why a consumption tax on nonresidents contrasted with an income tax on residents discriminates in a manner inimical to the Commerce Clause. The State's claim that other alternatives are inadequate because they preclude discrimination cannot be what this Court intended by its use of the phrase "nondiscriminatory alternatives adequate to preserve the local interests at stake." *See Hunt*, 432 U.S. at 353. Should New Jersey have been free to decline this Court's "invitation" to strike its ban on foreign waste because no adequate alternative would allow it to continue banning foreign waste? All would agree that is preposterous.[20]

The State laments a uniform fee because it puts the State to the unenviable task of choosing whether to lower the surcharge and not recover its "costs" or to raise the domestic fee and forfeit its right to spread costs among Oregonians irrespective of waste production. The State characterizes the former as "superficial" because "[a]n increase in the in-state waste disposal fee would have absolutely no impact on the free-flow of out-of-state garbage into Oregon Landfills." *Br. for Resp.*, p. 38.

Petitioner offers four comments. First, the Oregon Legislature already determined that should the surcharge be invalidated, domestic and foreign consumers of Oregon landfill capacity will be charged the same $.85 per ton. *Compare* ORS 459A.110(6) *with* Or. Laws 1991, Ch. 385, §§ 91, 92. Second, assuming the truth of the State's unsupported claim, the scheme would at least be constitutionally acceptable. Otherwise, that argument would obtain every time a state's realignment with constitutional principles failed to substantively advance the plain-

[20] At page 36 of its response, the State writes that a uniform fee, as nondiscriminatory alternatives go, is a "novel approach [nowhere] found in any of this Court's Commerce Clause or Privilege and Immunities Clause cases." That is genuinely startling. The State half-heartedly attempts to distinguish the line in *Chemical Waste* explicitly suggesting uniformity as an alternative by noting that it was Alabama's *purpose* to divert hazardous waste elsewhere and it was this protectionist *purpose* that might permissibly be advanced with a uniform fee. *Id.* at 36 n.20. Assuming the Court is not persuaded here that Oregon's purpose is similarly but more cleverly protectionist, the State's purported justification does not consider that economic protectionism inheres in purpose or *effect*. *See Chemical Waste*, 112 S. Ct. at 215 n.6. It is a remarkable reach, indeed, to recognize that uniformity is a suitable alternative to a scheme that purposefully diverts foreign waste elsewhere yet maintain that it has never been suggested as an alternative to a scheme having that same effect.

tiff's position. Certainly, constitutional jurisprudence is not so myopic.

Third, the State's claim considers just half the picture. It is not enough to scrutinize in isolation the effect of a uniform fee on interstate commerce; the effect on intrastate commerce must also be scrutinized to ensure equality of treatment. *See Maryland*, 451 U.S. at 759. As it currently stands, foreign consumers of landfill capacity will use alternative landfill sites if a price less than $2.25 per ton can be secured. Oregonians, conversely, will not send their waste elsewhere unless a price less than $.85 per ton is obtained. Just as before, the economics are plain. The Commerce Clause demands that market incentives be the same for interstate and intrastate commerce.

Fourth, the State's argument fails to appreciate the most fundamental threat Oregon's differential fee poses under the Commerce Clause: A multiplication of preferential trade barriers. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). Because the Commerce Clause is a product of political philosophy and is prophylactic in design, appearances cannot be minimized, especially where the interest at stake is union. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

CONCLUSION

Because the surcharge assessed by Oregon on foreign waste discriminates against interstate commerce on its face, in its purpose, and in its effect, thereby passing to the State a burden of justification it cannot carry, petitioner respectfully requests that this Court reverse the decision of the Oregon Supreme Court and strike ORS 459.297, ORS 459.298, OAR 340-97-110, and OAR 340-97-120 as violative of the Commerce Clause of the United States Constitution.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON, RESPONDENTS

COLUMBIA RESOURCE COMPANY, L.P., PETITIONER

v.

ENVIRONMENTAL QUALITY COMMISSION
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DEC 21 1993
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**On Writ Of Certiorari To
The Supreme Court Of The State of Oregon**

REPLY BRIEF FOR PETITIONERS OREGON WASTE SYSTEMS, INC., AND GILLIAM COUNTY, OREGON

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-70

OREGON WASTE SYSTEMS, INC., AND GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON, RESPONDENTS

No. 93-108

COLUMBIA RESOURCE COMPANY, L.P., PETITIONER

v.

ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON, RESPONDENT

On Writ Of Certiorari To The Supreme Court Of The State of Oregon

REPLY BRIEF FOR PETITIONERS OREGON WASTE SYSTEMS, INC., AND GILLIAM COUNTY, OREGON

Oregon strives at great length to explain why the discriminatory fee on disposal of interstate waste should be upheld despite the settled Commerce Clause principles set forth in our opening brief. In the midst of all of the verbiage, however, one argument is notably brief. Even Oregon does not seriously defend the holding of the court below that cost-based fees are exempt from the Commerce Clause's prohibition of discrimination against interstate

commerce (the State devotes less than two of its 37 pages of argument to an equivocal discussion of that topic).

Instead, Oregon tries repeatedly (*e.g.*, Br. 13-16, 26, 39) to revive a contention that the Court squarely rejected less than two years ago — the notion that, because of the particular characteristics of waste disposal transactions and the regulated nature of the waste disposal industry, taxes on waste disposal should be subject to Commerce Clause rules more lenient than those applicable to taxes on other types of commerce. *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992); see also *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2023 (1992); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). There simply is no reason for the Court to revisit that question here.

The remainder of Oregon's arguments are squarely at odds with this Court's settled Commerce Clause jurisprudence. Indeed, Oregon seeks nothing less than a revolutionary change in the law that would dramatically increase the States' ability to circumvent the Commerce Clause's prohibition of discrimination against interstate commerce. The Court should reject Oregon's invitation to inject confusion into this area of the law and reaffirm that discriminatory state taxes like the Oregon tax at issue here violate the Commerce Clause.

A. The Oregon Fee Discriminates Against Interstate Commerce.

The linchpin of Oregon's entire position is its repeated contention (see, *e.g.*, Br. 23-24) that the tax does not discriminate against interstate commerce. That assertion is quite remarkable in light of the words of the statute, which expressly single out interstate commerce for a tax not imposed on intrastate commerce. Pet. Br. 5. See *Chemical Waste Management*, 112 S. Ct. at 2014 (statute discriminated against interstate commerce because tax was "imposed on interstate commerce alone").

In arguing that the tax is not discriminatory, Oregon states (Br. 23-24) that "[t]he appropriate inquiry * * * should consider the entire structure the Oregon legislature has adopted to pay for solid waste management and disposal" and quotes this Court's statement to similar effect in *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981). The State asserts that

> Oregon residents support [the state's] solid waste management program through income taxes and by paying, indirectly, the numerous fees imposed on landfill operators and the dumping fee on in-state waste. Out-of-state waste producers pay the additional cost of the state's solid waste management program for disposing of out-of-state waste by paying, also indirectly, the out-of-state disposal fee.

Br. 24 (citations omitted).

The general proposition that a court should consider a State's entire tax structure in determining whether a tax is discriminatory is, of course, well settled. However, as we discussed in our opening brief (at 23), the Court's cases elaborating this "compensatory tax" doctrine — of which *Maryland* is one — establish clear principles for determining whether a tax on interstate commerce is in fact nondiscriminatory because it compensates for an equivalent tax on intrastate commerce. What is peculiar about Oregon's submission is that the State relies on the language of *Maryland* to justify examination of other state tax provisions, but it entirely ignores the standards the Court set in *Maryland* and subsequent cases for determining whether a tax is compensatory.

The Court repeatedly has held, for example, that taxes will qualify as compensatory only if a tax that applies exclusively to intrastate commerce is equal to the tax that

applies to interstate commerce, and the two taxes are triggered by "substantially equivalent event[s]." *Maryland* v. *Louisiana*, 451 U.S. at 759. The paradigmatic example is a sales tax on goods sold within the state and a use tax on goods purchased out-of-state. *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937). The Court has rejected the compensatory tax argument in every other context in which it has been raised. *Tyler Pipe Industries, Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 244 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 643 (1984); *Maryland* v. *Louisiana*, 451 U.S. at 759; *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 331-332 (1977).

Presumably recognizing that it cannot possibly satisfy the compensatory tax standard (and correctly so (see Pet. Br. 21)), Oregon simply argues that those rules should not apply in this case (see Resp. Br. 40).[1] The question here, therefore, is why the Oregon tax should be exempted from the Court's carefully crafted limits on the compensatory tax doctrine.

Oregon has no answer to that question. After all, these standards are not abstract principles. They are practical guidelines for identifying the situations in which a court can conclude with assurance that interstate commerce is not subjected to an economic burden from which intrastate commerce is exempted. Without these guidelines, a court undertaking the discrimination inquiry would be plunged into a classic situation of balancing the proverbial apples and oranges — examining a hodgepodge of taxes imposed on different classes of taxpayers in connection with different events, unable to make any certain determination regarding the relative burdens on interstate and intrastate commerce.

This case illustrates that problem perfectly. In pointing to the state income tax, Oregon ignores the fact that nonresidents who work in Oregon are subject to that tax. See Or. Rev. Stat. § 316.117 (1993). Thus, out-of-state residents who generate waste that is disposed of in Oregon must pay both the Oregon income tax and the tax on disposal of non-Oregon waste. The income tax can hardly compensate for the disposal tax when it is imposed on some of the very people who bear the disposal tax as well.[2]

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[1] The States appearing as amici curiae in support of respondents take a different tack, contending (Br. 11-18) that the Oregon tax qualifies as a compensatory tax. But it is clear that disposing of waste within Oregon (which triggers the tax at issue here) and earning income within the State (which triggers the allegedly compensatory tax) are not substantially equivalent events. Indeed, amici recognize that their position requires elimination of the requirement of a "substantially equivalent event." See Br. 17 & n.18.

Amici argue that such a step is justified because all of this Court's decisions refusing to apply the compensatory tax doctrine are inapplicable here. The tax schemes at issue in those cases assertedly led to "inequality" between intrastate commerce and interstate commerce. See Br. 13, 14-16. By contrast, amici assert that "equality *does* exist" here. Br. 14 (emphasis in original). But that assertion assumes the outcome of the compensatory tax inquiry. The critical question is whether the burdens are in fact equal. (As we discuss in the text below, they are not.) The only standards for making that decision are those contained in the Court's compensatory tax cases. Amici would no doubt prefer a different approach under which a State's assertion of equal burdens would be sufficient to end the Commerce Clause inquiry, but that would hardly safeguard interstate commerce from discriminatory state action.

[2] The discriminatory nature of the Oregon scheme — including the state income tax — is confirmed by the "internal consistency" test that this Court has used to determine whether state taxes discriminate against interstate commerce. See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987). If all States were to adopt the Oregon system, state residents whose waste

Indeed, this Court has already considered and rejected the very argument advanced by Oregon here. In *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), Pennsylvania sought to defend its discriminatory levy on trucks engaged in interstate commerce by pointing out that Pennsylvania-registered trucks paid a higher fee if certain other fees and taxes were included. This Court held that the discrimination could not be justified by reference to these other levies: "[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens." *Id.* at 289 (1987) (internal quotation marks and citation omitted). That conclusion disposes of Oregon's argument here.

Oregon seeks to justify its rather free-wheeling approach by repeatedly invoking (Br. 24-25, 40-42) this Court's decision in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). As the Court recently explained in *Fort Gratiot*, however, the ruling in *Sporhase* rested on the Court's determination that "a confluence of factors could justify a State's efforts to conserve and preserve ground water for its own citizens in times of severe shortage." 112 S. Ct. at 2026 (footnote omitted). *Fort Gratiot* squarely rejected the contention that *Sporhase* grants courts more leeway to uphold discriminatory state laws in the waste disposal context. 112 S. Ct. at 2026-2027; see also page 8, *infra*. The same conclusion is appropriate here.[3]

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is disposed of in-state would pay only the state income tax and (indirectly) the $0.85 per ton disposal fee, while residents whose waste is disposed of out-of-state would pay the state income tax and (indirectly) the $2.25 per ton disposal fee. Interstate commerce plainly would be subject to a greater financial burden.

[3] Indeed, *Sporhase* is even more inapplicable here because this case involves state taxes, not state regulations. To the extent that the aspect of *Sporhase* relied upon by Oregon has any relevance outside the water rights context (and we believe it does not (see page 8, *infra*)), the decision rests in substantial part on the notion that some leeway is necessary in determining whether regulations are evenhanded; otherwise States would always be required to subject interstate commerce and intrastate commerce to identical regulations. In the state tax context, that leeway already is accorded by this Court in the form of the compensatory tax doctrine.

B. Oregon's Reasons For Exempting The Fee From The *Chemical Waste Management* Test Are Wholly Unpersuasive.

Oregon argues that even if the tax does discriminate against interstate commerce, it should not be analyzed under the constitutional standard that this Court applied to the discriminatory waste disposal tax in *Chemical Waste Management*: when a state law discriminates against interstate commerce, "the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" 112 S. Ct. at 2014 (citation omitted). Again, Oregon's contentions are meritless.

First, as we discussed in our opening brief (at 20-22), Oregon is plainly wrong in arguing (Br. 25-28) that a discriminatory tax should be analyzed under the *Chemical Waste Management* standard only if the plaintiff shows that the tax is motivated by "economic protectionism." This Court has made clear that all discriminatory exactions are subject to that standard. Of course, the purpose underlying the levy remains relevant, but not dispositive: to the extent the State can show that the tax is justified by a legitimate purpose *and* that the purpose cannot be adequately served by

nondiscriminatory means, the tax may be upheld.[4] General assertions of pure motive cannot circumvent the analysis.

Second, again relying solely on the *Sporhase* decision, Oregon creates (Br. 27-30) several new categories for Commerce Clause analysis — "resource protectionist effect" and "'explicit barriers' to commerce between the States" and concludes that the tax should be upheld because it falls outside those categories. As we have discussed (at 6), nothing in *Sporhase* supports this elaborate new mode of analysis. To the extent the Court even applied a different Commerce Clause principle there, its decision rested on special considerations applicable to water rights that have no bearing on interstate movements of waste. See *Fort Gratiot*, 112 S. Ct. at 2026-2027 & n.6.

Third, Oregon weakly argues (Br. 30) that cost-based fees "do not implicate the kinds of concerns that would merit this [C]ourt's heightened scrutiny." But the State essentially ignores our showing (Pet. Br. 10-17) that this Court's decisions, especially the holding in *Guy* v. *City of Baltimore*, 100 U.S. 434 (1880),[5] and the purposes of the Commerce Clause, preclude the distinction that Oregon seeks to draw.

Instead of addressing the Court's Commerce Clause decisions, Oregon cites two decisions under the Privileges and

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[4] Thus, contrary to Oregon's apparent belief (Br. 43-44), the State bears the burden of demonstrating the *non*protectionist purpose for the tax.

[5] Oregon does mischaracterize the holding in *Guy*, suggesting (Br. 21 n.14) that there was no showing that the wharfage fee was cost based. But the City defended the fees on the ground that they were not "in excess of reasonable compensation for the use of the city's property" (100 U.S. at 441) and this Court held that the level of the fee could not justify the discrimination. That decision rejects the very argument that Oregon advances here.

Immunities Clause that supposedly "suggest" that discriminatory fees are constitutional under that provision. Both of those decisions *invalidated* discriminatory fees, however. And the snippets of dicta that Oregon quotes simply reflect the uncontroversial proposition that discriminatory fees are permissible when the non-resident imposes additional, unique costs upon the State or when residents pay an additional charge under a complementary statutory scheme. Those decisions provide no support at all for Oregon's position here and, in particular, do not justify abandoning the well-settled Commerce Clause principle that discriminatory taxes must be analyzed under the *Chemical Waste Management* test.

Fourth, Oregon suggests (Br. 27-28 & n.16) that the tax's discriminatory economic burden on interstate waste might not be substantial enough to deter disposal of waste in Oregon. Whether or not that is true is legally irrelevant. The additional economic burden on interstate commerce is sufficient to establish unconstitutional discrimination, regardless of whether that burden is sufficient to force consumers to withdraw from interstate transactions. See *Maryland* v. *Louisiana*, 451 U.S. at 760 ("[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates"). Certainly that burden translates into a higher cost for out-of-state enterprises that generate waste, a higher cost that will disadvantage those enterprises in competing with Oregon-based businesses.

Here, moreover, Oregon's own actions demonstrate the substantiality of the burden: as its "fall-back" position in the event the discriminatory fee is held unconstitutional, the Oregon Legislature chose *not* to extend the full $2.25 fee to intrastate commerce, and instead chose to reduce the interstate waste fee to $0.85 per ton, presumably because the $2.25 fee would impose too great a financial burden on Oregon citizens. See Pet. Br. 6 n.5.

Fifth, Oregon asserts (Br. 38) that there is no Commerce Clause issue in this case because Oregon could simply raise the fee on disposal of intrastate waste so that it equals the fee on disposal of interstate waste. But that same fact is present in every Commerce Clause case, and Oregon's submission would therefore vitiate the Commerce Clause. In fact, when they are forced to engage in even-handed taxation, States frequently do not simply raise the levy on intrastate commerce. Oregon's fall-back position is a perfect illustration of that phenomenon. Cf. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 41-42 (1990) (rejecting State's argument that taxpayer was not entitled to refund of tax violative of Commerce Clause because the State *could have* imposed higher tax rate on intrastate commerce as well as interstate commerce).

C. The Oregon Fee Is Invalid Under The *Chemical Waste Management* Test.

Oregon repeatedly mischaracterizes our position, attributing to us the view that a State may never impose a cost-based disposal fee on interstate waste that is higher than the fee on intrastate waste. See Br. 15, 22. That simply is not true. It is perfectly clear that a State may impose a higher per ton fee *if interstate waste subjects the State to per ton costs greater than intrastate waste*. Absent that justification, this Court's holding in *Chemical Waste Management* — and the long-settled Commerce Clause jurisprudence that case applied — foreclose a discriminatory tax on interstate commerce.

Here, the face of the statute and its implementing regulation make clear that Oregon's discriminatory fee cannot be justified on this basis. The statute requires the fee to be set at a level that recovers all types of costs borne by Oregon and its political subdivisions, including costs that are imposed by intrastate waste as well. By its plain terms, therefore, the

fee cannot be upheld on the ground it is limited to costs unique to interstate waste.[6]

Desperate for some other justification for the discriminatory treatment accorded interstate waste, Oregon asserts (Br. 37) that it is entitled to spread the costs of disposal of Oregon waste among all residents but require generators of interstate waste to pay the full cost of disposing of that waste. The discriminatory tax is supposedly the only way to accomplish that purpose.

We are quite skeptical that the purpose put forward by Oregon's counsel is a legitimate one. If it were, *any* discriminatory user fee could be insulated against Commerce Clause attack through a vague reference to the State's desire to have some of the "costs" supposedly paid for by in-staters through general revenue measures. That would open a large gap in the protection for interstate commerce. As we pointed out in our opening brief (at 15-17), the concept of costs is an elastic one that potentially would allow the States great leeway in imposing large financial burdens on a wide variety of types of interstate commerce.

Moreover, there is no guarantee that state residents will in fact bear the same economic burden as interstate commerce because the State need not actually set aside general funds equivalent to the revenues generated by the discriminatory tax on interstate commerce. Here, for example, Oregon simply asserts that general revenues expended on waste disposal are equal to $1.40 per ton of intrastate waste. That amount of the State's general fund is not dedicated to waste-disposal related costs and, to the extent there is a shortfall in the State's general fund or other priorities intervene, it might not

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[6] The state amici's contention (Br. 7-10) that the statute and regulation cannot be held invalid on their face is incorrect. The very terms of the statutory mandate *require* that the fee be calculated in a manner that is certain to be unconstitutional.

be expended at all. Allowing States to invoke this "cost-spreading" rationale to justify discriminatory exactions could reduce Commerce Clause analysis to little more than a fiscal shell game in which a State pointed to various slices of its general fund to justify various discriminatory fees without regard to whether the general fund monies ever actually would be expended.

It also is most unlikely that Oregon's professed purpose had anything to do with the adoption of the discriminatory tax. Under the *Chemical Waste Management* standard, Oregon bears the burden of demonstrating that this was in fact the State's purpose. In view of the large number of state measures that have been held unconstitutional on the ground that they impose unjustified discriminatory burdens on interstate waste (see NSWMA Am. Br. 6-7 & n.4), it would be remarkable if Oregon chose the same discriminatory path in order to accomplish an entirely different purpose.[7]

The Court need not rest its decision on either of these grounds, however. To the extent that the proffered purpose is legitimate and is in fact the rationale underlying Oregon's statute, there is a nondiscriminatory means of accomplishing it. Oregon could impose an even-handed tax and at the same time pay a subsidy to persons who dispose of intrastate waste, with the subsidy financed out of general revenues produced by taxes on all Oregon residents. That would produce a less discriminatory (indeed, nondiscriminatory) tax and allow Oregon to spread among all of its residents the costs associated with disposal of intrastate waste. Thus, even assuming Oregon is correct in arguing that its cost-spreading

[7] Indeed, as we discussed in our opening brief (at 26-31), the record makes clear that Oregon was motivated by protectionist purposes.

purpose is legitimate and actually underlies the discriminatory tax, the present fee nonetheless violates the Commerce Clause.[8]

[8] The state amici assert (Br. 12-13) that a rule permitting Oregon to follow this course, but forbidding the discriminatory tax challenged in this case, would elevate form over substance. But the Court has observed that "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, *but only action of that description in connection with the State's regulation of interstate commerce.*" *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 279 (1988) (emphasis in original). Thus, in *New Energy Co.*, the Court held unconstitutional Ohio's discriminatory tax credit for use of ethanol (which was not available for use of certain non-Ohio ethanol), while noting that the Indiana company challenging the Ohio measure was "the potential beneficiary of a scheme no less discriminatory than the one it attacks, and no less effective in conferring a commercial advantage over out-of-state competitors": a direct cash subsidy for in-state ethanol producers. *Ibid*. The fact that the discriminatory tax's economic effect was similar to that of a subsidy program arguably permissible under the Commerce Clause provided no reason for leaving Ohio's discriminatory tax in place. *Ibid.*

Moreover, requiring the fee for intrastate waste to be set at the same level as the fee for interstate waste would have the practical effect of reducing significantly the inherent political pressure to discriminate against interstate commerce. See Pet. Br. 16-17. Because the same fee would be paid by in-staters (at least in the first instance), the political system would be much more likely to operate to set the fee at an appropriate level.

That result is especially likely under the Oregon scheme. The receipts from the discriminatory fee are dedicated — they may be expended only for programs related to waste disposal. By contrast, only the $0.85 fee on intrastate waste is similarly dedicated. As we have discussed, the $1.40 per ton that Oregon contends is expended on these purposes from the general fund is never isolated and in fact may never even be spent. If Oregon enacted an even-handed disposal fee, all of those receipts would be dedicated for waste

Oregon complains (Br. 36-37) that it will have to restructure its tax system if the discriminatory tax is held unconstitutional. But the State plainly was aware of the possibility that the discriminatory fee might be invalid under the Commerce Clause. That is why the Legislature took the unusual step of including the "fall-back" tax in the statute.

More fundamentally, the very purpose of the Commerce Clause is to limit to some degree the tax systems available to the States. Whenever a state tax is struck down under the Constitution, the State's choice has been restricted, but that is the necessary consequence of all constitutional limits on state authority.

D. The Oregon Courts' Limited Scope Of Review Is Irrelevant To The Disposition Of This Case.

As it did at the certiorari stage, Oregon seeks to hide behind the state courts' limited scope of review, asserting that petitioners chose this forum in order to "hamstring" the State (Br. 14) and that the statute should be upheld because the State allegedly is disabled from advancing its arguments.

To begin with, as discussed in detail in our reply brief at the petition stage (at 5-6 n.4), we selected this judicial review option because it appeared to provide the most expeditious route for resolution of the numerous state and federal challenges to the discriminatory tax. Oregon has no basis whatever for its intimation that petitioners acted in bad faith.

The unconstitutionality of the tax is clear from the arguments presented above and on pages 10-26 of our opening brief. Those arguments do not stray beyond the state courts' scope of review. They rest solely upon the face of

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disposal-related costs. The fact that Oregon could no longer reallocate the $1.40 to other general government purposes in the event the fee were set too high would provide a strong incentive to set the even-handed fee at an appropriate level.

the statute and rule and related provisions of Oregon law. For that reason, this Court can and should hold the tax unconstitutional.[9]

Oregon's arguments, by contrast, *do* rest upon the record. For example, Oregon's sole support for its fundamental contention — that the tax is nondiscriminatory because it is balanced by general revenue measures imposed on Oregon residents — consists of citations to the rulemaking record. See Resp. Br. 24 (citing R. 592, 593, 671). Thus, it is clear the Court cannot uphold the tax under the limited scope of review. See also Pet. Br. 26-27 n.11.

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[9] Our record-based arguments (Pet. Br. 26-30) simply provide additional support for that conclusion. Oregon has not cited any authority establishing that this Court lacks the power to consider the facts set forth in the rulemaking record, which is part of the lower court record in this case. The Court need not consider the record-based arguments, however, because the statute is unconstitutional on its face. (To the extent those claims cannot be asserted in this proceeding, petititioners obviously retain their right to press them in other appropriate proceedings.)

CONCLUSION

The judgment of the Supreme Court of the State of Oregon should be reversed.

Respectfully submitted.

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IN THE

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OREGON WASTE SYSTEMS, INC., AND
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Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON,

Respondents.

On Writ of Certiori to the Supreme Court of the State of Oregon

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Brief Of The States Of Indiana, Arkansas, Florida, Maine, Mississippi, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Wisconsin And Wyoming, And The Commonwealths Of Kentucky And Pennsylvania, As Amici Curiae In Support Of Respondents

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QUESTION PRESENTED FOR REVIEW

Whether a State that chooses to finance its environmental protection programs through general taxation is required by the negative implications of the Commerce Clause[1] to subsidize those programs for waste that is generated elsewhere and shipped to the State for final disposal.

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[1]U.S. Const. Art. I, § 8, cl. 3: "The congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

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No. 93-70

IN THE

Supreme Court Of The United States

October Term, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON,

Respondents.

On Writ of Certiori to the Supreme Court of the State of Oregon

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Brief Of The States Of Indiana, Arkansas, Florida, Maine, Mississippi, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Wisconsin And Wyoming, And The Commonwealths Of Kentucky And Pennsylvania, As Amici Curiae In Support Of Respondents

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INTERESTS OF THE AMICI

The States Of Indiana, Arkansas, Florida, Maine, Mississippi, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Wisconsin And Wyoming, And The Commonwealths Of Kentucky And Pennsylvania, support affirmance of the judgment below. Because of their economic and geographic circumstances, each of the Amici has either already become, or has the potential to become, a recipient of large volumes of waste that are shipped in interstate commerce.

Like the citizens of Oregon, citizens of the Amici States and Commonwealths support environmental protection programs relating to solid waste through a variety of user fees and general

taxation. Under such a regime, the waste disposal activities of residents of other states who do not pay the general taxes used to support the environmental programs will be subsidized by the citizens of the Amici States and Commonwealths unless the Amici are allowed to charge an additional fee on the disposal of waste generated in other States. Each of the amicus States and Commonwealths has a strong interest in assuring that its taxpayers and citizens not subsidize the additional costs imposed on its jurisdiction by the shipment of such waste from other jurisdictions for disposal. Therefore each of the Amici has a strong interest in requiring those who generate waste in other states and ship that waste to the Amici States and Commonwealths for final disposal to pay a fair share of the costs of state programs designed to minimize the environmental harm from such waste disposal activities.

Some of the Amici have already attempted to accomplish this legitimate goal by imposing an additional fee on waste shipped from other jurisdictions in an amount necessary to offset what would otherwise be a subsidy for that waste, as the State of Oregon has done in this case. Indiana, for example, enacted a statute authorizing such an additional fee. Ind. Code § 13-9.5-5-1(b). However, before Indiana could act through its rulemaking process to calculate the amount of the additional fee necessary to offset the subsidy that would otherwise be provided to waste generated in other states, the United States Court of Appeals for the Seventh Circuit determined that any such fee, regardless of amount or relationship to the State's costs, was barred by the negative implications of the Commerce Clause and ordered any attempt to enforce the statute permanently enjoined. *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993).

The Commonwealth of Kentucky enacted legislation authorizing an additional fee on waste disposed of outside the waste management district in which it was generated. Ky. Rev. St.

68.178.[2] The Kentucky Supreme Court upheld the provision against a Commerce Clause challenge similar to the one mounted by petitioners in this case. *Carpenter v. Commonwealth*, 831 S.W.2d 188 (1992).

The State of Maine has also enacted legislation imposing an additional fee on imported waste "[t]o support those regulatory and administrative costs associated with imported municipal solid wastes." Me. Rev. St. § 2204(3).[3] The validity of these statutes under the Commerce Clause is currently in litigation. *Maine Energy Recovery Co. and Penobscot Energy Recovery Company v. Huber*, No. CV-92-473 (Super. Ct. of Kennebec County).

Montana law provides for Montana's Department of Health and Environmental Sciences to set an additional fee "based on the justifiable direct and indirect costs to the state of administering [its environmental laws] for solid waste generated outside Montana and disposed of or incinerated within Montana." Mont. St. 75-10-204.[4]

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[2]The Kentucky statute expressly required a demonstration of additional governmental services that are required by the imported waste before a differential fee can be assessed.

> [B]efore a fee differential may be imposed the county or urban-county government shall demonstrate that the differential is reasonably related to additional government services which must be undertaken because of the landfilling of non-planning area waste.

Ky. Rev. St. 68.178(2)(b). Additionally, the additional fee is strictly limited in amount and may not exceed one-quarter of the base fee charged on all waste disposed of at the particular facility, regardless or origin. *Id.*

[3]Maine has a parallel fee for imported "special waste," a category that includes, among other things, asbestos, oil spill debris, residuals from soil decontamination, wastewater facility sludge, ash, coal, oil, paper mill sludge, sandblast grit, ash from municipal solid waste, and other industrial wastes. Me. Rev. St. § 2203.

[4]After July 1, 1995, the fee will be statutorily set at $5.00 per ton for large facilities and for all incinerators, unless the Montana Legislature statutorily

Ohio statutory law currently provides for a fee on waste disposed of in a county other than its county of origin, and also imposes a fee on waste from other states at a rate of one and one half times the out-of-county amount; after January 1, 1994, waste from other States will be charged the "in-county" amount. Ohio Rev. Code § 3734.57(B).

The State of South Carolina has levied a similar fee on infectious waste that is imported from other jurisdictions. S.C. Code Ann. § 44-93-160 (Supp. 1992). The validity of the fee is in litigation. *Chambers Medical Technology of South Carolina, Inc. v. Jarrett, et al.*, No. 2-90-1360-8 (D.S.C.).[5]

At least 11 other States have enacted legislation that either imposes or authorizes similar fees.[6] Even those States that have

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adopts the fee set by the Department of Health and Environmental Sciences. *See* Mont. St. § 75-10-118 (Statement of Legislative Intent).

[5]South Carolina also imposes an additional fee of $10.00 per ton on solid waste not generated in South Carolina, or, alternatively, requires such waste to be assessed the same fees it would be assessed in the sending state. S.C. Code Ann. § 44-96-80(L). Mississippi similarly requires that solid waste be assessed a fee at the rate it would be assessed in the sending State, or the Mississippi rate, whichever is higher. Miss. St. § 17-17-53(3); 17-17-219(2).

[6]*See* Ala. Const. Amd. 523 (requiring additional fee of $60.00 per ton on out-of-state waste disposed of in St. Clair County); Cal. Pub. Res. Code § 41903 (authorizing cities and counties to assess reasonable fees on waste from outside city or county); Iowa St. § 455B.310(2)(a) (imposing fee on waste shipped from outside the service area in which disposal facility is located at 300% of fee on wastes from within service area); Kan. Stat. § 65-3415e (requiring counties to charge additional fee on waste generated outside county unless board of county commissioners unanimously votes not to do so); Mo. St. 260.203(8) (imposing charge of 10% of processing facility charges on infectious waste transported more than 300 miles); Minn. St. § 115A.919(2) (authorizing counties to impose additional fee on waste collected outside county); N.H. St. 147-B:8(III) (imposing additional fee of $.003 per pound on out-of-state hazardous waste); N.M. St. § 74-9-39 (providing for additional fee on waste generated outside the solid waste district); 27A Okla. St. §§ 2-10-802(A) and 803(A) (imposing a fee of $1.50 per ton on waste and $5.00 per ton for sludge from other states and authorizing environmental agency to set fee of not more than ten times fee on in-state wastes); Vern. Tex. Ann. Code § 361.136(j) (authorizing environmental

not yet found it necessary to impose additional fees on waste shipped from other States wish to retain the flexibility to do so should future circumstances warrant.

The Amici believe this Court should affirm the judgment of the Oregon Supreme Court and enunciate the standards by which a State may eliminate a subsidy to waste generation in other states, thereby allowing the States to retain a range of options by which their policymakers can solve problems generated by increased importation of waste.

SUMMARY OF THE ARGUMENT

This Court has consistently held that the mere fact that a fee or tax imposes some burden on interstate commerce is not, standing alone, sufficient to invalidate it under the Commerce Clause. Instead, the critical inquiry is whether the fee or tax will actually operate in a manner that discriminates against interstate commerce. Thus, the Court has upheld fees and taxes that seemingly apply *only* to interstate commerce because, when considered with other aspects of a State's statutory scheme, the statutes equalized the burdens between local and interstate commerce. The consistent theme running through this Court's decisions under the negative implications of the Commerce Clause is equality of treatment of interstate and local commerce, because it is well established that interstate commerce may be constitutionally made to pay its fair share of the costs of state services from which it benefits.

Moreover, where, as here, a statute is challenged on its face, this Court has consistently held that the challenger must show that the statute would be invalid in all its applications. It is not enough to show that, under some conceivable set of circumstances, the statute might be unconstitutional. Applied to the Commerce

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commission to impose additional fee on out-of-state hazardous waste or industrial solid waste by rule); W. Va. Code §20-5f-5a (fee on solid waste generated outside the solid waste "shed"); *cf.* La. Rev. St. 47:823(C) (requiring hazardous waste to be charged fee at rate equal to that of sending state, or the Louisiana rate, whichever is higher).

Clause, those precedents require that a challenger show a statute unconstitutionally discriminates against interstate commerce in all its applications.

Petitioners have not met that burden in this case. Indeed, they cannot show that the Oregon fee in question actually discriminates against interstate commerce under any circumstances, much less under all circumstances, a showing they must make before the fee can be declared facially invalid. Those who generate waste in Oregon already pay through general taxation for the range of state services necessary to ensure safe disposal of the waste, but those who generate waste in other States generally do not pay the in-state taxes necessary to ensure safe disposal of the waste in Oregon. The fee in question merely eliminates what amounts to a subsidy Oregon citizens are currently paying for safe disposal of waste generated elsewhere. Thus, the fee does not discriminate against interstate commerce, but merely assures that interstate commerce will pay its fair share of the State's costs.

This Court's decisions in the "compensating tax" area have consistently adhered to the principle of equality of treatment, upholding fees and taxes that resulted in such equality, and striking down those that resulted in inequality. Moreover, the Court's cases purportedly requiring a similar tax on a "substantially equivalent event" were all decided in the context of State taxes purporting to equalize the burdens caused by other State taxes that were not tied in any manner to the State's costs resulting from the taxed activity. As such, they provide no precedent for applying the "substantially equivalent event" test to Oregon's cost-based fee.

Petitioner's argument, if accepted, would require Oregon to either continue to subsidize the disposal of waste shipped from other States or totally restructure its tax system from one of general taxation to one based wholly on user fees. Nothing in the

Commerce Clause requires or even permits this Court to so drastically curtail traditional State prerogatives.

ARGUMENT

The fact that Oregon imposes a fee on the disposal of waste generated elsewhere does not by itself violate the Commerce Clause. Rather, petitioners must show that the fee *discriminates* against interstate commerce *in its actual operation*. Moreover, given that petitioners brought their claims as a facial challenge to the fees, it is not enough for them to show that the fees might, under some circumstances, be discriminatory. Rather, they must show that there are no circumstances in which the fees might constitutionally be applied. Petitioners cannot meet this burden because the fees merely eliminate a subsidy that would otherwise exist for waste shipped in interstate commerce to Oregon. Accordingly, the fees do not discriminate, and do not violate the Commerce Clause.

I. A Tax Which Burdens Interstate Commerce is Facially Valid Unless it Is Discriminatory in Operation Under All Circumstances

This Court long ago recognized that the fact a state fee or tax burdens interstate commerce marks the beginning, rather than the end of the inquiry under the Commerce Clause. "[A] state tax that burdens interstate commerce is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981) (multiple citations omitted). Rather, "[t]he common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." *Id.* at 759. Thus, as the Court has noted, "While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of state government in return for the benefits it derives from within the State." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959).

In conducting such an inquiry, "[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is [the Court's] duty to determine whether the statute under attack, whatever its name may be, *will in its practical operation work discrimination against interstate commerce*.'" *Maryland v. Louisiana*, 451 U.S. at 756 (emphasis added; citations omitted). Stated another way, the label "discriminatory" represents the Court's *conclusion* regarding the presumptive validity of a state exaction, rather than an independent analytical step.[7]

At some points in their brief, petitioners seem to concede that they must establish not only a facial disparity, but also discriminatory operation. Thus, according to petitioners:

> The test for determining whether a state exaction is unconstitutionally discriminatory was set out by this Court in *Chemical Waste Management* — if the state law "discriminates *both* on its face *and* in practical effect [against interstate commerce], the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake'"

Pet. Br. at 18 (emphasis added; other alterations by petitioners). At various other points in their brief, however, petitioners seem to *assume* that the fact the fee applies only to waste generated in other States establishes its discriminatory nature. *E.g.*, Pet. Br. at 10-14.

Petitioners apparently believe the fact that the Oregon fee applies only to waste shipped from other States conclusively establishes its discriminatory nature. However, that view is plainly

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[7]Of course, even a State law that is discriminatory may be sustained against a Commerce Clause attack if the State demonstrates sufficient justification for the discrimination. *E.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986). However, the point in this case is that the Oregon fee, properly viewed, is not discriminatory in the first instance.

out of line with the approach this Court has consistently taken. *Compare Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) (holding use tax that applied *only* to interstate commerce nondiscriminatory when considered in conjunction with sales tax), *with American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987) (holding facially neutral flat marker and axle fees discriminatory because they imposed a greater per-mile cost on interstate commerce). As the Court has noted, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963).

Thus, as the Court held in *Henneford v. Silas Mason Co.*, the seminal case on the "compensating tax" doctrine, the Commerce Clause is not violated if:

> When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of [the activity] than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.

300 U.S. at 584.

Moreover, because they have chosen to bring their claims as a facial challenge to the Oregon rules, petitioners cannot prevail unless they show that there are *no* circumstances under which the challenged provisions could be valid. *See New York State Club Ass'n. v. City of New York*, 487 U.S. 1 (1988) (In a facial challenge, the challenger must show that "the challenged law . . . 'could never be applied in a valid manner.'"). Thus, as this court has recognized:

> "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid."

Rust v. Sullivan, 111 S.Ct. 1759, 1767 (1991) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987), alterations by the Court); *see also City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984) ("[A] holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner."); *id.* at 796 (statute considered invalid "on its face" where "it is unconstitutional in every conceivable application").[8]

Thus, unless petitioners can show that the fee in actual operation will discriminate against interstate commerce "in every conceivable application," the fee is facially valid. As shown in greater detail below, petitioners cannot sustain that burden because those who generate waste in Oregon already pay the costs of the State's efforts to assure its safe disposal through general taxation, while those who are without the State do not. Thus, Oregon's imposition of those costs, and only those costs, on the disposal of imported waste merely assures that "the sum is the same when the reckoning is closed."[9]

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[8]Nor should this Court ignore the procedural posture of petitioners' challenge and treat this case as an "as applied" challenge, as Petitioners invite the Court to do. Pet. Br. at 26-31. It was Petitioners who chose to challenge the statutes in this procedural context rather than contest the fee when it was assessed. Accordingly, petitioners must meet the burdens of a facial challenge.

[9]Because of the procedural posture of this case, it would be inappropriate for this Court to determine that particular elements of the fee are excessive, an issue not decided by the Oregon Supreme Court. Such a challenge would properly be made in the context of a State-court suit for refund of the allegedly excessive portion of the fee. It is no accident that this Court's recent decisions on the constitutionality of State Court fees and taxes have frequently arisen in such a context. *E.g., Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963); *cf. Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (claim arose in State Court tax deficiency proceedings). The Tax Anti-Injunction Act, 28 U.S.C. § 1341, generally precludes federal declaratory or injunctive relief against such taxes. *See California v. Grace Brethren Church*, 457 U.S. 393, 408-11 (1982)

II. Petitioners Have Not Shown That the Fees Are Actually Discriminatory in Their Operation.

In this case, petitioners have not shown that the additional fee is discriminatory under any circumstances, much less under all circumstances. The fee merely eliminates a subsidy that would otherwise exist for interstate waste disposal.[10] Oregon residents already pay the costs that the State incurs to assure the safe disposal of solid waste through a variety of state taxes. However, those who generate waste in other States do not pay the in-state taxes necessary to support those state activities. Thus, the challenged fee merely equalizes the costs among all users and assures that interstate commerce "pays its fair share." In fact, without the additional fees, disposal of waste from other States is subsidized by Oregon, with its taxpayers bearing full brunt of the costs necessary to assure the safe disposal of not only their own waste, but that of others as well. The additional fee merely eliminates this unfair subsidy, and in no manner works a "discrimination" against interstate commerce. Oregonians already pay their fair share of the costs of waste disposal regulation and cleanup through in-state taxation. The additional fee simply assures that those who wish to take advantage of Oregon's low private disposal costs do not get a free ride.

This nondiscriminatory aspect of the fee is perhaps best demonstrated by considering other possible situations in which such a fee might be imposed. Suppose, for example, that a State decided to fund its solid waste programs by setting aside some portion of its sales and use taxes, or even by an additional sales or use tax levy devoted to that purpose. Such a decision would be eminently rational, as a State could view its solid waste problem as a function of excessive consumption, and could determine that the tax paid on the sale or use of a product in the State should include an amount

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[10]The Oregon Supreme Court characterized the additional fee as a "compensatory fee" because it is based upon and applied to the provision of a narrow range of state services that are directly connected to the activity on which the fees are imposed. Pet. App. 41a n.19

sufficient to ensure the safe disposal of the product when it reaches the end of its useful life. Waste generated in other states, however, by hypothesis consists of the discards from products that have never been subject to the taxing state's sales or use taxes. Thus, the State instead imposes an equivalent levy on waste disposal for such products, even though disposal of waste generated in the State is not taxed as such. In such a circumstance, "[w]hen the account is made up, the stranger from afar is subject to no greater burdens as a consequence of [his consumption] than the dweller within the gates." *Henneford v. Silas Mason Co., supra.* Though the resident may pay his tax on one incident or transaction, and the nonresident on another, when the reckoning is closed, the sum is the same. *Id.* While Oregon, apparently, does not impose sales or use taxes, its decision to fund its governmental operations through other forms of taxation[11] should not preclude Oregon from requiring interstate commerce to pay its fair share of costs that interstate commerce otherwise does not pay in any form.[12]

Alternatively, a State could, as petitioners suggest, impose an equally high fee on both in state and out of state waste, but further provide taxpayers who are required to pay the fee, either directly or indirectly, with a credit against their general state tax bills, or a direct cash subsidy, in recognition of the fact that their taxes have

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[11]The general tax scheme of Amicus South Dakota, for example is roughly the converse of Oregon's, in that it imposes sales and use taxes, but not income taxes.

[12]Petitioners' claim that those who generate waste in other States somehow already *do* pay their fair share of the State's costs, Pet. Br. at 25-26 is unsupported. While it is true that interstate businesses pay taxes on their business activities *in Oregon*, it is equally true that any waste such companies generate *in Oregon* is not subject to the additional fee. Moreover, petitioners' argument on this score fails to recognize the limitations imposed by the fact they have brought a facial challenge to the fee. It is not enough for them to show that some hypothetical interstate business might pay for the State's solid waste services both through general taxation and the additional fee. Rather, they must show that the fee "is unconstitutional in every conceivable application" and "could never be applied in a valid manner." *City Council v. Taxpayers for Vincent*, 466 U.S. at 796, 797-98.

already paid for the services for which the fee is assessed. There is nothing in this Court's jurisprudence that would suggest such a regime would violate the Commerce Clause. It is sheer sophistry to suggest that Oregon's current statutory scheme, which has precisely the same economic effect, would run afoul of the Constitution. *See Complete Auto Transit v. Brady*, 430 U.S. 274, 284 (1977) (criticizing disparate results in two earlier cases where there was "no real economic difference between the statutes.").

Nor do any of this Court's precedents require a contrary result.[13] In each of its cases since *Henneford v. Silas Mason Co.*, the Court has remained faithful to the principle that a State fee or tax violates the Commerce Clause only where it results in discrimination in its actual operation. Thus in *Halliburton Oil Well Cementing Co.*, the Court invalidated the Louisiana use tax only because it subjected foreign, but not local goods to tax on the amount of labor and shop overhead attributable to manufacture of a product. 373 U.S. at 70-71. Similarly, in *Maryland v. Louisiana*, the Court invalidated Louisiana's "first use" tax on petroleum extracted from the outer continental shelf and processed in Louisiana for interstate shipment because it would result in inequality, rather than equality of treatment of interstate and local commerce. As the Court noted:

> The concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate. Here, Louisiana claims that the First-Use Tax compensates for the effect of the State's severance tax on local production of natural gas. To be sure, Louisiana has an interest in protecting its natural resources, and, like most States, has chosen to

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[13]Petitioners' repeated suggestion that this Court's decision in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992) controls the outcome of this case borders on the frivolous. There, this Court *expressly declined to decide* the issue presented in this case because, in *Chemical Waste Management*, "The State present[ed] no argument . . . that the additional fees make out-of-state generators pay their 'fair share' of the costs of Alabama waste disposal facilities." 112 S. Ct. at 2016 n.9.

> impose a severance tax on the privilege of severing resources from its soil. But the First-Use Tax is not designed to meet these same ends since Louisiana has no sovereign interest in being compensated for the severance of resources from the federally owned OCS land. The two events are not comparable in the same fashion as a use tax complements a sales tax. In that case, a State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State. *No such equality exists in this instance.*

451 U.S. at 758-59 (emphasis added; citations omitted).

Here, of course, the State *has* identified "the burden for which [it] is attempting to compensate," namely that the activities that generate waste elsewhere have not been subject to the panoply of state taxes that Oregon uses to fund its waste programs. Those who generate waste in Oregon pay taxes to Oregon, some of which support the State's solid waste efforts. Requiring those who ship waste to Oregon to similarly pay those same costs, though in a different form, shows that equality *does* exist in this instance, at least for purposes of the facial validity of the statute.[14]

Similarly, in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), the Court invalidated an in-state manufacturer exemption from the State's wholesale tax because it would result in discrimination in fact against out-of-state manufacturers. The Court rejected the

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[14]Petitioners' suggestion that Oregon's general tax laws fall on a "much larger — and entirely different — group of taxpayers" than those who generate waste in Oregon, Pet. Br. at 25, fails to recognize that, by its very nature, solid waste (which is simply another term for simple trash) is generated by anyone having activities in Oregon and certainly would be generated by anyone having sufficient activities in Oregon to be subject to the State's general income tax. Moreover, mathematical precision is not required. As this Court has noted, it is enough if the fees reflect a "fair, if imperfect, approximation of the use of the facilities." *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972).

notion that the exemption compensated for a higher manufacturing tax because of the actual operation of the manufacturing tax:

> Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing and which portion to sales. The fact that the manufacturing tax is not reduced when a West Virginia manufacturer sells its goods out of State, and that it is reduced when part of the manufacturing takes place out of State makes clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax imposed on Armco and other sellers from other States.

467 U.S. at 643 (footnotes omitted).[15]

In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), the vice in the state tax scheme at issue again was that it generated inequality, rather than equality. In particular, a business that engaged in manufacturing and wholesaling entirely within the State was protected from the possibility of multiple taxation by an exemption, while a similarly situated business that engaged in one of those activities in another State was not. 483 U.S. at 246-247. Thus, the

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[15]The Court also applied what it termed the "internal consistency" test, noting that if other States enacted similar taxing schemes the result would be discrimination against interstate commerce. 467 U.S. at 644. Thus, the Court noted, "If Ohio or any of the other 48 States imposes a like tax on its manufacturers — which they have every right to do — the Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." *Id.* In the present case, however, even if all other States enacted systems like Oregon, there would be no impermissible discrimination against interstate commerce. Residents of all of the States would pay for environmental programs relating to waste they disposed of in their own States through general taxation (or specific fees), and would pay for similar programs for exported waste through specific fees. In neither circumstance would they be required to pay more than the cost of those programs simply because they chose to dispose of the waste abroad rather than at home.

Court held that the tax was "inconsistent with our precedents holding that a tax violates the Commerce Clause 'when it unfairly burdens commerce by exacting *more than a just share* from the interstate activity.'" *Id.* at 247 (emphasis added).[16]

Finally, in *American Trucking Associations, Inc. v. Schiener*, 483 U.S. 266, the Court invalidated Pennsylvania's flat fees because they operated to impose a higher per-mile cost on non-Pennsylvania based trucks. Thus, to the extent any claim was made that the fees were calibrated to reflect costs of State facilities, the structure of the fees would ensure that interstate carriers paid *more* than their fair share of those costs. Obviously, then, no argument was open to Pennsylvania that the flat fees represented some fair approximation of the costs of road use imposed by such trucks. Indeed, as the Court noted, "[the fees] *do not even purport to* approximate fairly the cost or value of the use of Pennsylvania's roads." *Id.* at 291. (emphasis added).

In considering and rejecting Pennsylvania's argument that the taxes could be said to "compensate" for higher registration fees paid by intrastate truckers, the court noted that "even if the relative amounts of the States' registration fees confer a competitive advantage on trucks based in other States, the Commerce Clause does not permit compensatory measures for the disparities that result from each State's choice of tax levels." *Id.* at 288.[17]

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[16]Moreover, the State in *Tyler Pipe* made no attempt to justify the tax differential as reflecting only the costs of governmental services for which in-state businesses had already paid through some other form of taxation. Therefore, the Court had no occasion to consider an issue such as that raised by Oregon in this case, and the decision cannot be viewed as expressing any conclusion on such an issue.

[17]Moreover, it is far from clear that such an argument would have been sustainable on the facts of the case. Interstate truckers who traveled in Pennsylvania, at least to the extent that they were based in States participating in the "International Registration Plan" ("IRP") were required to pay that portion of the Pennsylvania registration fee that reflected the proportion of miles they traveled in Pennsylvania. *See* 483 U.S. at 271-273 (describing operation of the IRP). Thus, to the extent that Pennsylvania's high registration fees created a "competitive disadvantage," that disadvantage was proportionately shared by

However, the question of whether a State can constitutionally discriminate in order to eliminate a competitive disadvantage that it has itself imposed on its local industries, the question considered by the Court in *Scheiner*, is fundamentally different from the question of whether a State can require interstate commerce to pay its fair share of the costs such commerce imposes on the State without totally restructuring its tax system. The Court's cases seeming to require that a tax be on a "substantially equivalent event," *e.g.*, *Armco; Tyler Pipe*, were decided in the former, rather than the latter context. To extend such a rule to a case such as this, where the State seeks only to recover actual costs that interstate commerce imposes upon it, and otherwise does not pay is wholly unwarranted.[18]

Petitioners' argument, if accepted would require a State to either subsidize interstate commerce, or completely restructure its taxing system. The former is clearly not required by the Commerce Clause, as this Court has repeatedly stated that interstate commerce may be made to pay its fair share. *E.g.*, *Maryland v. Louisiana*,

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interstate carriers. Carriers based in those non-IRP states with reciprocity agreements with Pennsylvania were, of course, required to pay a registration fee to their home states, *id.*, but as the Court noted, "while it is true that registration fees are lower in some States, they are also higher in some other States." 483 U.S. at 288.

[18]The genesis of the "substantially equivalent event" test is itself somewhat obscure. The language first appeared in *Maryland v. Louisiana*, 451 U.S. at 759, but does not appear to have been the holding in that case, and in any event was expressly tied to the unequal manner in which the State taxes at issue actually operated. *Id.* In *Armco*, the "substantially equivalent event" dictum was seemingly elevated to a holding, 467 U.S. at 643, but the Court again expressly tied it to the State's disparate tax treatment of the two, which resulted in the tax scheme at issue being actually discriminatory. *Id.* It was not until *Tyler Pipe* that the Court appeared to divorce the "substantially equivalent event" test from its moorings in actual, rather than merely apparent discrimination. 483 U.S. at 244. The Court has never explained why the "substantially equivalent event" test is constitutionally required, or, for that matter, why sales and use are "substantially equivalent events," but manufacturing and wholesaling are not, except in the context of a finding of actual discrimination.

451 U.S. at 754; *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 284 (1977); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). The latter is a radical departure from principles of federalism which generally allow a State to structure its tax system as it sees fit, so long as that system ultimately does not discriminate against interstate commerce. "'There is no demand in [the] Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power.'" *Henneford v. Silas Mason Co.*, 300 U.S. at 584 (quoting *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480 (1932)).

In sum, petitioners have "'failed to show that, whatever distinction there existed in form, there was any substantial discrimination in fact.'" *Id.* Accordingly, the judgment of the Supreme Court of Oregon should be affirmed.

CONCLUSION

For the reasons stated above, the Amici States and Commonwealths respectfully urge that the Court affirm the judgment of the Supreme Court of Oregon.

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